



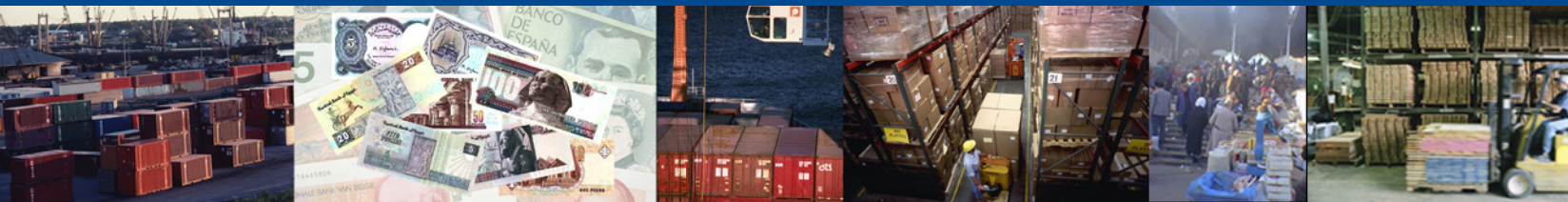
USAID
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SOUTHEAST ASIA COMMERCIAL LAW AND TRADE DIAGNOSTICS – CAMBODIA

FINAL REPORT

Original diagnostic: February 2006

Supplemental diagnostic: November 2007



UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT



SOUTHEAST ASIA COMMERCIAL LAW & INSTITUTIONAL REFORM AND TRADE DIAGNOSTICS – CAMBODIA

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Booz | Allen | Hamilton

delivering results that endure

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TABLE OF CONTENTS

I.	INTRODUCTION.....	1
A.	Cambodia: At a Threshold.....	1
B.	The SEA CLIR Trade Diagnostic: A Regional Initiative	2
C.	The Methodology of Diagnostic: A 360° Review	3
D.	Summary of Subject-Specific Findings	5
II.	COMPANY LAW AND CORPORATE GOVERNANCE	10
A.	Introduction.....	10
B.	Legal Framework	10
C.	Implementing Institutions	14
D.	Supporting Institutions.....	14
E.	Social Dynamics	15
F.	Recommendations.....	15
III.	CONTRACT LAW AND ENFORCEMENT	17
A.	Introduction.....	17
B.	Legal Framework	17
C.	Implementing Institutions	19
D.	Supporting Institutions.....	20
E.	Social Dynamics	21
F.	Recommendations.....	22
IV.	REAL PROPERTY LAW	23
A.	Introduction.....	23
B.	Legal Framework	23
C.	Implementing Institutions	28
D.	Supporting Institutions.....	28
E.	Social Dynamics	29
F.	Recommendations.....	29
V.	SECURED TRANSACTIONS LAW	31
A.	Introduction.....	31
B.	Legal Framework	31
C.	Implementing Institutions	33
D.	Supporting Institutions.....	33
E.	Social Dynamics	34
F.	Recommendations.....	34
VI.	BANKRUPTCY LAW	35
A.	Introduction.....	35
B.	Legal Framework	35
C.	Implementing Institutions	36
D.	Supporting Institutions.....	37

E.	Social Dynamics	37
F.	Recommendations	38
VII.	COMPETITION LAW AND POLICY	39
A.	Introduction.....	39
B.	Legal Framework	39
C.	Implementing Institutions	41
D.	Supporting Institutions.....	43
E.	Social Dynamics	44
F.	Recommendations.....	45
VIII.	COMMERCIAL DISPUTE RESOLUTION	47
A.	Introduction.....	47
B.	Legal Framework	47
C.	Implementing Institutions	51
D.	Supporting Institutions.....	53
E.	Social Dynamics	55
F.	Recommendations.....	55
IX.	COURT ADMINISTRATION.....	56
A.	Introduction.....	56
B.	Legal Framework	56
C.	Implementing Institutions	58
D.	Supporting Institutions.....	60
E.	Social Dynamics	61
F.	Recommendations.....	61
X.	FOREIGN DIRECT INVESTMENT	63
A.	Introduction.....	63
B.	Legal Framework	64
C.	Implementing Institutions	67
D.	Supporting Institutions.....	68
E.	Social Dynamics	71
F.	Recommendations.....	72
XI.	INTERNATIONAL TRADE LAW AND POLICY.....	73
A.	Introduction.....	73
B.	Legal Framework	73
C.	Implementing Institutions	76
D.	Supporting Institutions.....	76
E.	Social Dynamics	78
F.	Recommendations.....	78
XII.	FLOW OF GOODS AND SERVICES.....	79
A.	Introduction.....	79
B.	Legal Framework	79
C.	Implementing Institution.....	80

D.	Supporting Institutions – Public.....	86
E.	Supporting Institutions - Private	88
F.	Social Dynamics	93
G.	Recommendations.....	94
XIII.	FLOW OF MONEY	97
A.	Introduction.....	97
B.	Legal Framework	97
C.	Implementing Institutions	98
D.	Supporting Institutions.....	100
E.	Social Dynamics	100
F.	Recommendations.....	100
XIV.	FLOW OF PEOPLE.....	102
A.	Introduction.....	102
B.	Legal Framework.....	102
C.	Implementing Institutions	103
D.	Supporting Institutions.....	103
E.	Social Dynamics	103
F.	Recommendations.....	104
XV.	FINANCIAL CRIMES.....	105
A.	Introduction.....	105
B.	Legal Framework.....	105
C.	Implementing Institutions	107
D.	Supporting Institutions.....	108
E.	Social Dynamics	109
F.	Recommendations.....	109
XVI.	INTELLECTUAL PROPERTY.....	111
A.	Introduction.....	111
B.	Legal Framework.....	111
C.	Implementing Institutions	112
D.	Supporting Institutions.....	113
E.	Social Dynamics	114
F.	Recommendations.....	114
XVII.	COMPILATION OF RECOMMENDATIONS.....	115

I. Introduction

A. Cambodia: At a Threshold

In recent years, Cambodia has used its place at the heart of Southeast Asia to engage the various mechanisms of free trade for the purpose of building its economy. The country's entry into the World Trade Organization (WTO) in 2004 was an enormous achievement, signaling to the world that, after years of brutal strife and conflict, Cambodia is ready to conduct business under a common set of rules. In addition, Cambodia has developed several bilateral trade agreements and is particularly active in regional initiatives, including the Association of Southeast Asian Nations (ASEAN). As an investment destination, Cambodia attracts increasing interest from companies throughout the world; it now offers compelling opportunities in banking, insurance, consumer and retail marketing, construction, energy, hotels and tourism, mining, cement production, agro-industry, and export and domestic oriented manufacturing, as well as support sectors including industrial estates, ports, telecommunications, and transport services.

A number of regional advantages are found in Cambodia. The country's competitive environment is not handicapped by large, state-owned enterprises or a private sector dominated by a relatively few privileged families (although the need for a competition policy, as discussed later in this report, is great). Recent years have shown increased public participation in legal development and economic integration, including a thriving non-government organization (NGO) sector; a growing community of young professionals who have been trained internationally and speak English; widespread, budding efforts to incorporate international practices, such as International Accounting Standards; and an improving infrastructure for movement of goods, services, and money. Cambodia has developed a core set of business-friendly laws, including a modern company law, a new customs law, and an unusually strong secured transactions law, and seeks to draft and pass additional laws, with considerable donor support, before the end of 2008. Also, Cambodia's progressive labor law supports strong worker protections and thus can be regarded as a potential advantage for foreign investors concerned about their reputations in the labor market.

Against this backdrop, Cambodia is now challenged with integrating the commitments of its membership in various trade agreements into its legal and institutional infrastructure. This challenge includes meeting its many specific commitments pertaining to its trading regime made during the WTO accession process,¹ including continued reform of its legal framework, which is necessary for the new trade rules to be properly supported and implemented. It also means a prolonged emphasis on implementation, including public outreach, professional education, and strengthening of the capacities of institutions and individuals charged with making the new business-friendly systems work. In addition, current perceptions of corruption in government institutions continue to undermine the competitive advantages Cambodia offers. In Transparency International's 2007 survey of perceived corruption, Cambodia ranked 162 out of 179 countries

1 A summary of these commitments can be found at the document entitled Study on Domestic Economic Impact and Social Costs of Adjustment to the WTO Membership of Cambodia, prepared by the Cambodian Legal Resources Development Center in collaboration with Cambodia's Ministry of Commerce (March 25, 2004).

studied.² In the 2007 Index of Economic Freedom, Cambodia's ranking also fell from the previous year (from 68th to 102nd), due in significant part to its very low score in the "Freedom from Corruption" section.³ Although Cambodia has taken steps toward addressing issues of government opacity and informal payment schemes, a great deal remains to be done to erase these perceptions.

B. The SEA CLIR Trade Diagnostic: A Regional Initiative

This report is part of a USAID-sponsored initiative in understanding and responding to economic growth, harmonization, and integration efforts in five emerging economies of Southeast Asia – Vietnam, Laos, Cambodia, the Philippines, and Indonesia. The Southeast Asia Commercial Law and Institutional Reform and Trade Diagnostic Activity (SEA CLIR Trade) is designed to allow USAID's Regional Development Mission/Asia, the governments of these countries, and other interested entities to better understand the opportunities for reform in Southeast Asia's commercial law and trade environment. It also establishes a baseline on which USAID can prioritize its future regional technical assistance.

SEA CLIR Trade first examines the status of commercial laws and institutions and trade facilitation in each of the participating states, including each country's respective strengths, weaknesses, and opportunities for development. Through the comprehensive methodology first established through USAID's Seldon Project for Global Trade Law Assessment and Assistance (Seldon Project),⁴ this diagnostic examines:

- Company Law
- Contracts Law and Enforcement
- Real Property Law
- Secured Transactions Law
- Bankruptcy
- Commercial Dispute Resolution
- Court Administration
- Competition Law
- Foreign Direct Investment
- International Trade Law
- Financial Crimes
- Intellectual Property
- Flows of Goods and Services
- Flows of People⁵
- Flows of Money

2 Transparency International, Corruption Perceptions Index (2007).

3 Heritage Foundation, Index of Economic Freedom (2007) (ranking Cambodia 102nd out of 157 countries rated, though still higher than Indonesia, Vietnam, and Laos. The Philippines ranked 97th. All of these rankings are categorized as "mostly unfree" or "unfree.")

4 Detailed information about the Seldon Project can be found at www.bizlawreform.com.

5 For the purposes of this diagnostic, "flows of people" refers to the legal movement of individuals across international borders for trade-related reasons, such as tourism, provision, or consumption of services.

Then, based on individual country reviews and organized opportunities for broad-based response to individual country findings, SEA CLIR Trade will also produce an overall regional synthesis report that will:

- Make intra-regional and subject-matter comparisons of international trade and commercial legal frameworks and associated institutions
- Identify regional commercial law reform and trade capacity needs and establish program- and project-level priorities
- Benchmark and evaluate regional progress toward an international trade and business-friendly legal and regulatory environment
- Provide analytical and planning tools and metrics that will help to design new regional strategies and approaches for sustainable, cost-effective reform activities.

C. The Methodology of Diagnostic: A 360° Review

The examination of commercial and trade-related laws and institutions in Southeast Asia, from both an individual country and regional perspective, involves a comprehensive yet flexible framework for analyzing a complex and dynamic development challenge. Taking data from a broad spectrum of stakeholders, the diagnostic builds a “360-degree picture” of the challenge:

Legal Framework. The diagnostic first examines the laws and regulations that serve as the basis for SEA CLIR Trade countries’ ability to achieve and sustain market-based development. The diagnostic answers the following questions: *How closely do existing laws reflect emerging global standards? How well do they respond to commercial realities that end-users face? What inconsistencies or gaps are present in the legal framework?* Often discovered through this review are opportunities to make relatively small changes that may result in significant openings for business development and expansion.

Implementing Institutions. Next, the diagnostic examines institutions that hold primary responsibility for implementation and enforcement of the laws, regulations, and policies governing one or more of the areas addressed in this report. For example, courts are usually a crucial institution in the examination of commercial law. Problems uncovered often relate to bureaucratic inefficiency, lack of resources and training, and, of paramount concern, real or perceived corruption. With respect to the flow of goods, services, and people, Customs and immigration authorities are the chief implementing institutions.

The 360-degree picture:

- Legal Framework
- Implementing Institutions
- Supporting Institutions
- Social Dynamics

Supporting Institutions. The diagnostic then considers the organizations, individuals, or activities without which the legal framework or policy agenda cannot be fully developed, implemented, or enforced. Examples include notaries, lawyers, banks, business support organizations, professional associations, universities, and similar ancillary service providers. Of

particular interest with respect to supporting institutions is whether they have any meaningful involvement in *what the law says*. Where there has been “buy-in” from affected constituencies, a law and its commensurate system for implementation are more likely to be understood, to be used properly, and to achieve their overall purpose.

Social Dynamics. Finally, studying social dynamics entails asking whether the affected constituencies of a law or policy perceive a need for change, and how they are demonstrating this need. Are they effectively lobbying institutions that can make a change? Is the media seizing the issue as a topic of public concern? Are individuals speaking out? Or have social dynamics compelled a less positive approach – for example, is the “gray economy” growing as a response to overly burdensome conditions for market entry? Analysis of social dynamics may affect the course an assistance project takes. Where outside participation is strong and public understanding high, a reform program may involve a relatively small number of government officials who are capable of implementing the reforms. In contrast, where mistrust and misunderstanding are abundant, an approach that involves significant engagement of “end-users” will likely be necessary.

This report has been compiled from two diagnostic phases. The Cambodia-based portion of the SEA CLIR Trade initiative took place from February 11-24, 2006. A team of commercial law and trade professionals traveled to Cambodia to review the laws, public and private sector institutions, and social dynamics pertaining to the country’s commercial law and trade. The team consisted of the following individuals, each assigned one or more topics:

- Andrew Mayock (*Team Leader*) (Flows of Money, Flows of People)
- Peter J. Baish (Flows of Goods and Services)
- Joanne Cornelison (Flows of Goods and Services)
- Thomas N. Jersild (Company Law, Real Property Law)
- Douglas M. Muir (Contract Law, Secured Transactions, and Bankruptcy)
- Maria Coppola Tineo (Competition Law and Policy)
- Louise D. Williams (Foreign Direct Investment, International Trade Law)
- Scott Worden (Commercial Dispute Resolution, Court Administration, Financial Crimes)
- Amy Allen (Project Coordinator).

The team conducted a series of meetings with over 100 people who participate in Cambodia’s economy. Unlike the other SEA CLIR-Trade diagnostics, however, the February 2006 diagnostic took place in the absence of a formal bilateral assistance relationship between the United States and the Cambodia government, which had been suspended in 1997.⁶ Thus, most meetings took place with private sector, NGO, and donor representatives (although a limited number of mid-level government representatives were interviewed). Using information compiled from all of the meetings, along with a plethora of related documents, the team developed a number of findings with respect to Cambodia’s relative strengths, weaknesses, and opportunities. On February 24, 2006, the team held a roundtable discussion with representatives of the private sector, donor, and diplomatic communities, and received and incorporated their insights.

⁶ A summary of U.S.-Cambodian relations can be found at <http://www.state.gov/r/pa/ei/bgn/2732.htm>. Specific information about the Congressional restrictions can be found in a report of the Congressional Research Service, Cambodia: Background and U.S. Relations (2002).

Based on the February 2006 visit, a lengthy report was drafted, circulated for review among a number of U.S. government offices, and published in a semi-final form in April 2007. The report summarized the team's findings in each of the four areas of review – legal framework, implementing institutions, supporting institutions, and social dynamics – and included recommendations for specific areas of reform. In September 2007, the USAID mission to Cambodia provided the report to various offices within the Cambodian government and followed up with meetings to discuss the report.⁷ The primary reaction from government officials was that significant changes had taken place in Cambodia since the February 2006 visit, and that the report did not reflect either these changes or the perspective of the Cambodian government. The officials requested that members of the original team return to Cambodia to update and supplement the report.

Accordingly, from November 1-9, 2007, three members of the original team returned to Cambodia and engaged in a series of meetings with government representatives, including officials from the Council of Ministers, the Ministry of Commerce (including CAMCONTROL), the Ministry of Finance (including Customs officials), the Ministry of Justice, the Council for Development of Cambodia and National Assembly. Representatives of these agencies provided both extensive feedback on the report and, thereafter, extensive supplemental written information for the purpose of updating the report. During this period, the three team members also met with a limited number of private sector, NGO, and donor representatives for the purpose of gaining additional perspectives and supplementary information.

The instant report combines many of the major findings of the February 2006 visit with the updated information and supplemental perspectives provided in November 2007. While several chapters have been updated as a result of the November 2007 visit, the update did not affect all information in this report. Accordingly, as noted throughout the text, some information is only current as of February 2006. Although this report centers specifically on Cambodia's commercial law and trade environment, its overriding purpose remains comparative, and it will be useful as the SEA CLIR Trade initiative compares the same issues in the other SEA CLIR Trade countries.

D. Summary of Subject-Specific Findings

The findings of the 15 subject matter areas examined in the diagnostic are:

Company Law and Corporate Governance. Cambodia enacted a new company law in 2005, which has significantly reduced the time and cost required to register a new business. With assistance from the Asian Development Bank (ADB), the Ministry of Commerce launched a new company registry based in Phnom Penh, and, more recently, has expanded the registry into regions beyond the capital. Although the registration of companies has been significantly streamlined, private sector representatives continue to assert that, once a company has become formally registered, the licensing and regulatory environment is difficult to navigate and is undermined by the solicitation of informal fees by government actors at various levels. These circumstances result in many enterprises, particularly those located outside of Phnom Penh,

⁷ These meetings preceded resumption of U.S. assistance to the Cambodian government, which began in or about October 2007.

refraining from joining the formal sector. The new company law sets forth corporate governance principles that, on paper, follow many international best practices for investor protection and encourage domestic and foreign investment. However, certain governance provisions may discourage transparency and new investment. Both the new registration procedures and the governance rules in the new company law will require a focused effort on implementation. A new emphasis on reducing licensing and regulatory requirements is also warranted.

Contracts Law and Enforcement. Although Cambodia does not yet have a modern system in place to support the use and enforcement of commercial contracts, a new civil code that will update the current decree on contracts was close to enactment as of November 2007. In addition, drafting of a new law on commercial contracts and a new law on commercial courts was reportedly underway at that time. This emerging legal framework aims to increase reliance on and confidence in the use of written commercial contracts for most business transactions in Cambodia. As of November 2007, however, significant improvements are needed with respect to access to laws. As the legal regime for contracting in Cambodia continues to evolve, there is high demand for a central repository of laws and regulations, in Khmer and English, and better access to laws among judges, lawyers, and others.

Real Property Law. Cambodian law limits land ownership to Cambodian citizens. There are many *de facto* forms of foreign landholding, however, including leasing from Cambodian owners, indirect ownership through Cambodian companies, and acquisition of land concessions (which, unlike ownership, foreigners may directly hold). Yet even with these devices, foreign landholding is more constrained and less secure than in full market economy countries or than necessary for optimal future economic development. Cambodia has never had a reliable, standardized system of land titling, but a comprehensive, long-term survey and titling project is currently in process with donor help; in time, this system will cover much of the significant commercially-usable land in Cambodia. However, even that system is being slowed by the significant number of title disputes, in which political influence often plays a role.

Secured Transactions Law. Cambodia enacted a secured transactions law in May 2007. In concert with this new law, the Ministry of Commerce established a Secured Transaction Filing Office. According to the Ministry, all required technologies have been procured and installed, including hardware, system software, and application software. The domain name, www.setfo.gov.kh, has been registered at Ministry of Post and Telecommunication (MPTC) and the site itself is informative and professional. Filing Office staff have been trained and ACLEDA Bank staff who will collect filing fees have received initial training. Some training of the major end-users in Phnom Penh, primarily bank loan departments, has taken place. As of November 2007, a local IT consultant and filing staff are testing application software of the Filing Office system. The Ministry of Commerce projects formal launching of the online filing registry in January 2008. Public education, judicial training, and other outreach efforts are now critical aspects of the implementation of the new law.

Bankruptcy (Insolvency). Although Cambodia had no bankruptcy (insolvency) law at the time of this report, a draft law was very close to enactment – having been passed by the National Assembly and in the hands of the Senate – as of November 2007. In the absence of the law, creditors have not been well protected in Cambodia and business failures have led to a scramble

between shareholders seeking to escape with business assets and creditors attempting – usually unsuccessfully – to secure them. The new law includes a clear hierarchy of creditors' rights, clear powers and duties of administrators, and a rehabilitation process for saving viable businesses. Unlike the laws of some nearby countries – most notably Vietnam – it does not assume a link between bankruptcy and incompetence or criminality. By itself, however, the new law will not lead to rapid improvement in the current situation. There is no firm schedule for training judges and administrators. Further, Cambodia's court system suffers from broad and deep deficiencies in funding, staffing, and training, and is widely perceived as inefficient and corrupt. Thus, it will not be easy for the court system to implement and enforce the new law, nor for stakeholders to trust it to do so.

Competition Law. In June 2005, the Ministry of Commerce established a Working Group on Competition to oversee the drafting and adoption of a new law on competition. This Working Group has received considerable support from donors. The overarching goal of adopting a competition law is to create a regulatory framework to maintain and improve efficiency in markets and enhance consumer welfare. The achievement of these goals in Cambodia will prove challenging, however, because to succeed as an entrepreneur requires a close relationship with the government, according to private sector observers.

Commercial Dispute Resolution. Cambodia's courts are generally considered by the private sector, the donor community, and NGOs to be unreliable and plagued by informal payments, a lack of commercial sophistication, and a lack of political independence. The largest impediments to better court performance are structural, and the non-governmental and private sectors believe that greater political will is needed to ensure that necessary changes are made. In March 2006, Cambodia enacted a commercial arbitration law that promised a welcome alternative to the court system. In response to concerns that the structure of the new commercial arbitration board is not sufficiently independent, the government was reportedly preparing to guarantee the tribunal's independence through regulatory measures in November 2007. Another positive aspect of the Cambodian commercial dispute resolution landscape is the Labor Arbitration Council, which since 2004 has had authority to resolve collective labor disputes. From the outset of its operations, the Arbitration Council gained the respect of both labor and employers and reportedly caused both a reduction in the number of unauthorized strikes and a significant decrease in the time it takes to resolve a labor dispute. In the short term, the challenge will be to operate the proposed commercial arbitration board in a way that borrows from the successes of the Labor Arbitration Council. In the longer term, Cambodia will need to improve the quality of its legal education and training and increase the transparency of legal codes and court decisions before it can expect to see businesses gain confidence in commercial dispute resolution.

Court Administration. Improvements in Cambodia's court system will take a significant amount of time, resources, and political will to be fully realized. Most courthouses, including the only Appeals Court, are in a considerable state of disrepair. Computers are rare – indeed, the absence of consistent power sources means that they cannot yet be used extensively – and docketing and filing is disorganized and done manually. Decisions are almost never published. Although judges reportedly receive relatively high salaries as of November 2007, other court staff, particularly clerks, are underpaid. Lawyers complain frequently of not being notified of critical court dates and of being denied access to relevant case files. In the perception of NGO and private sector

observers, it is rare for lawyers to brief legal issues or to submit more than the basic forms to commence proceedings. These issues are reported to occur in a culture of legal informality whereby negotiations between parties, judges, and clerks may have as much or more meaning than case documents.

Foreign Direct Investment. In recent years, Cambodia has depended heavily on investment in the garment sector, an area that depends on a plentiful supply of unskilled, relatively low-paid labor. To sustain economic growth, Cambodia must broaden its efforts to attract outside investors, and, as evidenced by standing room only attendance at a recent Investor's Forum, this diversification is taking place. Relative to its neighbors, Cambodia offers a number of competitive advantages, including an economy that does not carry the near-overwhelming burden of state-owned enterprises; a location at the heart of Southeast Asia, including a deep-water port; a robust civil society, which allows for the integration of new ideas and points of view; and a progressive labor law that ensures consumer confidence in Cambodian goods. Cambodia's central challenges with respect to developing foreign investment include continued development and implementation of its legal infrastructure; reductions in perceived and actual corruption; cultivation of human resources; development of physical infrastructure; and reduction of energy costs.

International Trade Law. Cambodia's immediate challenge is to integrate the commitments required by its membership in bilateral, regional, and international trade agreements into its legal and institutional infrastructure. This challenge includes completing its many specific, trade-related commitments made during the WTO accession process, including the enactment of a comprehensive legal framework, which is necessary for the new trade rules to be properly executed. In the longer term, Cambodia must build an international trade strategy aimed at a series of broad-based principles, including: (1) addressing perceptions of corruption; (2) diminishing its reliance on unskilled labor; and (3) developing methods of complementing its neighboring countries in areas where regional activity brings stronger returns, such as tourism, promotion of foreign investment, and improved infrastructure.

Flow of Goods. The passage of a new customs law in July 2007 was a major accomplishment. When coupled with the pending implementing regulations, due for completion in 2008, it should be a significant step toward providing greater certainty to the trade community. At this time, major reform challenges include improvement in human resources within the border agencies, an increased emphasis on risk management, anti-smuggling enforcement, and increased public-private partnerships. The public agencies would be well served by continuing consideration and responsiveness to issues articulated by the trade community. Reported issues include duplication of agency functions, continued non-tariff barriers (including expectation and routine payment of informal fees), and a lack of regulatory transparency. In addition, overland and port transport costs in Cambodia are the most expensive in region, double those of Thailand and substantially more than in Vietnam. Continued development of special economic zones in Cambodia may support the country's efforts to enhance trade and foreign investments.

Flows of Money. Cross-border transactions in Cambodia reflect a relatively moderate amount of monetary exchange compared to neighboring countries. Over \$6 billion in goods and services were traded in 2005, with exports at \$2.7 billion and imports at \$3.7 billion. Net FDI inflows

amounted to \$216 million in 2005, which was up significantly from \$121 million in 2004. Overall, Cambodian laws, public agencies, and private institutions support basic trade-related capital flows, but the system is underdeveloped. While improvements have been made in basic credit and ATM services and fundamental trade finance products are available to traders, trade finance products are not broadly used. Foreign currency exchange poses few problems as it is easily exchanged for all traders and the economy is heavily dollarized.

Flows of People. The provision of tourism services represents a significant and rapidly growing segment of cross-border trade flows. Total tourist arrivals in 2005 reached 1,421,615, up 35 percent over 2004, when just over one million arrivals were registered. Tourism is now the second-largest foreign currency earner in Cambodia's economy, as Angkor Wat and Cambodia's beaches have helped attract international tourists. Overall, Cambodia has made significant improvements to its laws and within its public and private institutions to facilitate tourism services. The Cambodian government has greatly reduced travel restrictions, streamlined processes, and upgraded its automation. Additionally, the rise of the tourism industry has supported further improvements in a broad group of related economic areas, including banking and infrastructure.

Financial Crimes. Money laundering and terrorism financing have not been significant problems in Cambodia, in part because the country's financial system is relatively small and unsophisticated. Cambodia is beginning to place protections against the increase of financial crimes that may occur with the growth in its banking sector and economy. These include a draft law on money laundering and terrorism financing, and a draft law to create a financial intelligence unit (FIU). At the moment, however, Cambodia has few financial crime controls in place. Smuggling of drugs, timber, alcohol and fuel is reportedly a problem, and much of the commercial activity in Cambodia is conducted in cash, which may be easily carried across Cambodia's relatively porous borders with Thailand and Vietnam. The most significant problem Cambodia faces with respect to financial crimes is enforcement. The National Bank of Cambodia has primary regulatory authority over the banking sector but lacks the capacity to investigate or monitor complex financial transactions. More importantly, the court system lacks the capacity to investigate and prosecute complicated financial crimes, and has been wholly unable to prosecute serious crimes generally.

Intellectual Property. After a flurry of pre-WTO accession activity, in which Cambodia enacted three major laws pertaining to intellectual property rights (IPR), the topic of intellectual property (IP) has lost momentum with a marked decrease in implementation and enforcement efforts. While Cambodia has not been named to the Office of the United States Trade Representative Special 301 list of countries failing to adequately and effectively enforce IPR, the growing problem of IP piracy in Cambodia is mentioned annually in U.S. industry submissions. Counterfeit and pirated goods are widely available in Phnom Penh and Siem Reap, and IPR are seldom enforced at the border. It is reasonable to expect that Cambodia's prospects for growth arising from foreign investment may be constrained by failure to better protect IP. Currently, the law only requires protection of products locally produced, and the authorities act on imports only at a company's request. However, the government has asked donors to assist with drafting a decree for border measures.

II. Company Law and Corporate Governance

A. Introduction

Company law is crucial in market economies; it sets the legal environment for the creation and operation of privately owned businesses. *Good* company law is especially critical in transition economy countries. It can encourage entrepreneurship by making it easy to start up and register a company; it can encourage businesses to move from the underground economy into the publicly registered taxpaying economy; and it can encourage new investment – and provide investor protection – by setting forth clear and objective rules for a company’s ongoing internal governance.⁸

In 2005, Cambodia enacted a new company law. Implemented with assistance from the Asian Development Bank (ADB), the law streamlined the procedures under which companies may register with the state. The law also sets forth corporate governance principles that, on paper, follow many international best practices for investor protection and encouragement of domestic and foreign investment.

Company start-up still requires approvals other than company registration, and the private sector reports many difficulties in this regard. In addition, governance rules in the new company law will require implementation over time. The new law also includes some governance provisions that could discourage transparency and new investment.

B. Legal Framework

Cambodia’s National Assembly adopted the **Law on Commercial Enterprises** in April 2005 and the law entered into force in September 2005. The law is based in part on Canadian models – both from the civil and common law traditions – and also is broadly similar to company laws of other English-speaking countries, including the U.S., the United Kingdom, Singapore, Australia, and Hong Kong.

Company start-up and registration. In many transition economies, company start-up and registration can be lengthy, costly, often unpredictable, and conducive to corrupt payments – all of which discourage both domestic and foreign investment.⁹ In such countries the most-needed company law reform is simply to prescribe and implement a quick, efficient, inexpensive company registration procedure.

Such a procedure is now prescribed in the new Cambodian company law, which:

- Establishes the Commercial Registration Department within the Ministry of Commerce, whose duties include registration of companies (Article 259)

⁸ A helpful widely-used statement of governance principles for transition-economy countries (as distinguished from countries with developed capital markets such as the U.S., Western Europe, Singapore, and Japan) is contained in General Principles of Company Law for Transition Economies, published under the auspices of the OECD in 1999.

⁹ See generally, World Bank, Doing Business 2008 (2007).

- States that when a new company files its articles of incorporation, the Commercial Registration Department shall issue a certificate of incorporation that is to be dated the same day unless the incorporator(s) specify a later day (Articles 264-65)
- Specifies clearly and objectively all of the contents required in a company's articles of incorporation (Article 93)
- States that after accepting the articles for filing, the Commercial Registration Department shall issue a certificate of incorporation (Article 97)
- States explicitly that "a company comes into existence and acquires legal personality on the date shown in the certificate of incorporation" (Article 98).

Implementation of a new registration procedure began in August 2004, when the new law was still under consideration. Implementation of the new procedure is being carried out within the Ministry of Commerce with the assistance of the ADB. While implementation is not yet complete – expansion beyond the capital has begun just recently – there have already been positive results.

Some features of the simplified procedure, and some issues relating to them, are:

- The fee for standard company registration has been reduced from about \$600 to \$105 as of August 2007. Some observers said that even this fee is high (it is higher than in most states in the U.S.), but there are issues regarding allocation of fee revenues for the registration function. Some also said that, because the new system is transparent, a company no longer needs to hire a "facilitator" (for a fee of nearly \$600) to steer it through the requirements.
- All fees are posted in large print on the wall at the Commercial Registration Department.
- A host of former requirements have been eliminated, including the requirements of newspaper publication and of a letter from the municipal governor approving the location of the business (which itself required a payment and unpredictable delay).
- Required minimum capital has been reduced from \$5,000 to \$1,000. Donor and private sector representatives further urge that there be no minimum capital requirement.¹⁰
- Overly detailed forms required in the past are being simplified. For example, the form for filing the articles of incorporation, which requires extensive unnecessary information, is to be reduced to a bare statement of the elements required in the new company law.
- A company law handbook is being prepared to explain the new law and associated registration procedures.
- A new website will host the revised forms, fees, and registration procedures.

A plan to decentralize the Registry to allow filing in the provinces is underway. With the assistance of ADB, the Ministry of Commerce has established branch offices in Battambang Province (Battambang, Banteay Meanchey, and Pailin City). With implementation beginning on

¹⁰ In its annual Doing Business reports, the World Bank has long advocated eliminating minimum capital requirements. See <http://www.doingbusiness.org/>.

September 17, 2007, two branch local companies and three new companies were registered within the first month.

With these improvements, the registration of a standard company now takes two to three days, according to both Ministry officials and lawyers and others who deal with the Registry. These steps have resulted in a marked increase in company registrations. The following table illustrates the improvement:

Year	Company Registrations
2003	696
2004	1049
2005	1509
2006	1607

As of November 2007, there are 15,566 registered companies in all, according to the Ministry of Commerce. According to several interviewees during the February 2006 diagnostic, many of these companies previously existed but were unregistered, and have since become “legal.”

Another feature of the reformed registration system is that a company can be incorporated – and thus can proceed with necessary start-up activities such as renting space, buying equipment, etc. – without first having received the other permits necessary for it to do business. Such other permits normally include labor registration (perhaps a month required) and tax registration (about two weeks). Approval is also required from the Council for Development of Cambodia (CDC) if certain tax incentives are sought and, depending on the company’s business, regulatory permits may also be required from the Ministries of Industry, Land, Tourism, Environment, etc.

Significantly, the new company registration procedures do not reduce the need for these approvals from other government bodies, which can be time-consuming, unpredictable, and costly. Where there are markets, some market regulation is necessary, but – as the World Bank’s Doing Business initiative has exhaustively exhibited in recent years -- too much regulation is a problem. It is now well established that countries offering a business-friendly regulatory environment grow faster.¹¹ Such an environment comprises a relatively simple and clear set of rules for launching and operating a business that are easily accessed through such mechanisms as “one-stop shops.” It also involves a willingness of government to *refrain* from regulating certain aspects of the market. For example, countries that do not bestow national and local authorities with duplicative or ultra-discretionary licensing powers, unduly restrict the right of employers to hire and fire at will, or perpetuate an unwieldy and complicated tax regime are considered more business-friendly than those that do the opposite. Having ranked poorly in the World Bank’s most recent examination of licensing regimes – 144th out of 178 countries surveyed – Cambodia should welcome and cooperate fully with licensing reform initiatives the ADB is pursuing.

Corporate governance and other features of the new company law. The new company law provides for three forms of companies:

¹¹ Simeon Djankov, Caralee McLiesh, Rita Ramalho, Regulation and Growth (World Bank, March 17, 2006).

- General partnership (in which the partners are personally liable for the partnership's obligations)
- Limited partnership (in which a general partner is personally liable for the partnership's obligations and a limited partner is liable only to the extent of his agreed contribution)
- Limited company, which may be either a *private limited company* (which may not have more than 30 shareholders, may restrict share transfer, and may not offer shares to the public), or a *public limited company* (which may offer shares to the public).

There are no public companies in the sense of companies with widely-held investor ownership. There are a few public companies as defined in the company law, but that is only because other laws, such as the banking law, require that companies in certain businesses be organized as public companies under the company law.

The new company law also has new provisions for corporate governance, many of which follow current international best practices in countries with developed capital markets. It can be argued that such provisions are not needed considering current circumstances in Cambodia (including the absence of widely-held companies and the absence of courts that are familiar with company and business law), but they are beneficial in that they anticipate future development and can protect owners and investors in closely-held businesses as well. These “advanced” provisions include:

- Imposition of a “duty of care” on directors and officers similar to that imposed under Western laws (Article 289)
- Provision for derivative lawsuits brought by investors in the name of the company against misbehaving directors (Articles 287-88)
- Detailed provisions for a company's board of directors, including statements of their powers, provisions for their removal at shareholder discretion, committees, and disclosure of conflicts of interest (Articles 116-37).
- Detailed provisions for company shares, including authorization of different classes of shares, authorization of share options, and prohibition of bearer shares (Articles 143-54 and 169)
- Prohibition of dividends or share buybacks when insolvency of the company would result (Articles 155 and 158)
- Detailed rules for shareholder meetings, voting, proxies, and other investor-protective matters (Articles 205-23)
- Requirements for financial statements, audits, and shareholder access to them (Articles 224-234).

Notwithstanding these features, the new company law also includes provisions that do not conform to international best practices and that could be used to further practices such as insider

minority control and to hinder transparency in governance. Those would discourage new investment. Other discouraging aspects of the law include provisions that would permit separate classes of voting stock with different voting rights (Article 145) (thus not following a “one-share-one-vote” rule) and provisions that would permit two-year director terms and staggered and classified boards (Articles 121-23) (thus reducing the opportunity for shareholder monitoring of directors and director accountability). Also, the new law does not incorporate the strong rules for approval of insider transactions, such as transactions between a company and a director acting personally, that many other countries’ laws have.

Information on companies. One problem encountered during this diagnostic was the general lack of statistical and other information on Cambodian companies. Efforts were made to obtain, for example, breakdowns of companies by type of business (such as by industrial classifications as used in the U.S.); size (by any rough measure such as number of employees or capital), number of shareholders; number of companies that are foreign-owned vs. domestically-owned vs. state-owned; and number and names of companies that are linked in common ownership, etc. Though it may exist, such information was inaccessible. These statistics would be useful in assessing corporate governance needs for Cambodian companies. With assistance from the ADB, the legal office of the Ministry of Commerce is working to improve the database maintained for these purposes. The new database uses the International Standard Industry Code (ISIS Code), as supported by ADB.

In 2005, the World Bank ranked Cambodia last among eight regional countries in the amount of financial and ownership disclosure required from its companies.¹² The types of disclosures the World Bank examined for that purpose included disclosure of family, indirect and beneficial ownership of stock, voting agreements among shareholders, use of external auditors, and making ownership and financial information available to current and potential investors.

Neither the new company law nor any other Cambodian law requires such disclosure. This continues to be a serious shortcoming in the law, and can only discourage investment. (The new company law requires a company to appoint an auditor and to present an auditor’s report to shareholders at each company annual shareholder meeting (Articles 224 and 229), but does not require the other above-mentioned types of disclosure.)

C. Implementing Institutions

The **Ministry of Commerce** is the primary regulator under the company law, its most important duties (described above) being those relating to registration of companies, including initial registration, registration of other acts and documents, checking and approval of company names, amendments of articles of incorporation, mergers, and dissolutions.

D. Supporting Institutions

The **courts** are the ultimate recourse for resolution of company disputes. The new company law gives them jurisdiction to hear shareholder derivative suits against company directors and

¹² The eight countries, ranked from best to worst, were Philippines, Thailand, Malaysia, Singapore, Indonesia, China, Vietnam and Cambodia. World Bank, Doing Business 2005.

officers. The development of a commercial court, or the new commercial arbitration board, has the potential to build public confidence in the resolution of company disputes where such confidence does not yet exist.

Private lawyers, accountants and other professionals are necessary and helpful for advice with regard to company registration and corporate governance. Their input is critical in drafting laws such as the new Company Law and devising registration procedures.

E. Social Dynamics

Prior to the enactment of the new Company Law, there was a clear demand for a modern company law and for an expedited company registration procedure. These demands were met, in part, by the Ministry of Commerce, donors, and the legal community. However, the entrepreneurial sector in the provinces beyond Phnom Penh remains essentially informal. New companies do not yet register in large numbers because they do not see the need for doing so.

As previously noted, there remains a continuing demand for efficiency and transparency in the granting of other approvals needed for a company's full operation. There will be a continuing (and currently unmet) demand for advice, training, and education with regard to investor rights and corporate governance.

F. Recommendations

- Continue, and if practicable expand, the implementation of company registration reform the Ministry of Commerce is carrying out with ADB assistance, including:
 - Further simplify the forms
 - Expand the Ministry of Commerce website to host new procedures and policies, the text of the company law, all forms, all Ministry announcements and regulations; and statistics on companies such as those shown in the chart on page 19 of this report
 - Establish provincial offices for registration of companies under Ministry of Commerce control
 - Establish training programs for personnel.
- Establish a program on corporate governance that would, among other things, provide training and education on corporate governance and protection of investors in Cambodia. As discussed earlier, the new company law contains several “advanced” provisions that follow international best practices. These can protect investors and encourage investment in Cambodia. There is still much to be learned from corporate governance guidelines and practices in other transition countries as well as countries with developed capital markets.

This would, in effect, implement the corporate governance provisions of the new law just as the Ministry/ADB program is implementing the startup/registration provisions of the new law. Target groups would include:

1. Judges, who have a strong need for knowledge in this area including knowledge of their powers under the derivative litigation and other parts of the new law

2. Company directors and officers
 3. Company investors/shareholders
 4. Potential domestic and foreign investors
 5. Financial institutions
 6. Professionals, including lawyers and accountants.
- Establish procedures for greater collection and dissemination of data on companies, such as the data listed in “Information on Companies” above. Some of these data can be collected when a company registers (for example, identifying its business sector using a standard industrial code system).
 - Consider establishing a “one-stop shop” system for regulatory approvals other than company registration, as many other countries have done. In this system, one single body coordinates (and may issue) all necessary approvals, following a uniform and consistent policy. The government’s general opposition to such a concept should be examined and sound alternatives should be explored.
 - Consider amending the new Company Law to require greater disclosure of company ownership and financial information (see “Lack of Disclosure by and Information about Companies” above) and to remedy the other investment-hindering governance provisions mentioned earlier.

III. Contract Law and Enforcement

A. Introduction

Cambodia is moving closer to having a modern system of commercial contracts. The current law pertaining to contracts, known as Decree 38, was passed in 1988, before the transition to a market economy had begun. In recent years, the Japanese government and ADB have sponsored the drafting of a new civil code, which includes detailed provisions on contracts. As of November 2007, this new code was reported to be very close to full enactment, and the drafting of a law on commercial contracts and a new law on commercial courts was reportedly underway.

Cambodia does not have a strong tradition of written contracts. The standard of contract drafting is not always high. The implementing institutions are weak; in particular, the courts are slow and inefficient and are widely seen as corrupt. Contract enforcement is slow and unreliable.

B. Legal Framework

The basis for commercial contract law in Cambodia is Decree No. 38 D, “Referring to Contract and Other Liabilities,” passed in 1988 (‘Decree 38’), which was before Cambodia had begun its transition to a market economy, and this fact is reflected in the text. While the Decree incorporates some modern and liberal legal concepts appropriate to a market economy, on the whole it is still a traditional socialist contract law, of a sort that was common across the former Communist bloc 20 years ago but has almost vanished today. The contract law is long overdue for revision or replacement.

The new civil code promises to considerably update Cambodia’s system of contracts. Moreover, the Ministry of Commerce is working with ADB on the enactment of a special law on commercial contracts, which seeks to streamline the resolution of commercial disputes. In addition, a draft law on commercial courts was being constructed with stakeholder input as of November 2007. The construction of a special commercial court, in conjunction with the commercial arbitration board that is nearly in place (see discussion later in this chapter), suggests that the use of contracts may expand significantly in the future.

However, as of November 2007, concern remained in the donor community and private sector that the notion of “breach of trust,” as traditionally found in Cambodia’s criminal law, would continue to be found in the criminal code, once a new one is enacted. The notion of criminal liability attached to breach of contract threatens to gravely inhibit the formation of written contracts in the future.

As of November 2007, Decree 38 recognizes the principle of freedom of contract. In theory, any competent person can make any kind of contract, as long as it is not contrary to law or public policy. All actors – individuals, enterprises, collectives, and state agencies – are legally equal, and the Decree specifically allows a variety of types of contract, including leases, basic sales, contractor contracts, bailments, sureties (guarantees), and possessory pledges. There is a statute

of frauds, stating that all contracts over 50,000 riels must be in writing and a statute of limitations of five years, apparently fixed and non-waivable.

However, Decree 38 is not a modern contract law. It is relatively short and its provisions are not detailed. This is significant in a system where judges have limited capacity to interpret and apply law with consistency. There is a short introductory section (Articles 1-33, about five pages), several chapters dealing with particular types of contracts (Articles 34-120, on leases, bailments, etc.), and a short, vague final section dealing with torts (Articles 121-135).¹³ The Decree does not have a definition section, and none of the key terms of art are defined in other laws.

Decree 38 does not address certain areas of law. For example, there is no discussion of agency, and the Decree has no provisions for specialized contracts, such as installment-purchase or franchise or insurance contracts. Transfers of obligation are not contemplated.

The Decree also neglects to address financing beyond simple loans and possessory pledges. Many financial mechanisms that would be useful to Cambodian businesses – secured transactions, warehouse receipts, finance leasing, and factoring – are not contemplated. There is no discussion of liens, foreclosure, execution, or any other creditors' rights. Interest rates are fixed at five percent and acceleration of payments is not allowed.¹⁴

Decree 38 does not distinguish between commercial and consumer contracts, nor does it provide for warranties or any other consumer protection mechanisms. There is some discussion of remedies – void and voidable contracts are distinguished – but ultimately there is no means of remedy other than rescission. Damages are mentioned, but no means of assessing or limiting damages is given. Specific performance does not exist.¹⁵

Furthermore, the law contains some provisions that seem to be troublesome holdovers from the socialist period. Article 2 states that:

The contracting parties shall deal in an atmosphere of trust and honesty, respecting the social ethics particularly the elimination of the "exploitation of one party by the other" concept.

Then Article 5 provides that a contract shall be void when “it is contrary to social interests or violating social ethics.” Finally, Articles 11 and 12 allow a court to rescind or void a contract if there is “undue profit” or even if there is a difference in value between considerations given:

Article 11:

-
- 13 Many legal codes do not make the Anglo-American distinction between contracts law and torts, but instead treat them as “obligations.” The reasoning is that both are laws dealing with duties and liabilities. So the combination is not, in itself, unusual. But it is quite striking that Cambodia’s major tort law comprises just three pages out of 21.
- 14 This provision (Article 59) seems to be completely ignored by the Cambodian banking system, which regularly charges interest rates of 15 percent and higher.
- 15 Although they differ in some respects, the current Cambodian contract law has many points of similarity with the current Laotian contract law. The two were drafted just a few years apart – 1988 and 1992 – and both were written while the countries were still primarily socialist. Both show the influence of French and, more immediately, Vietnamese models. In fact, both seem to have been inspired by the 1980s Vietnamese contract law, which had many of the same issues and problems as those identified in this section of the Report..

When entering into a contract, should any party take advantage of the situation of another party with undue profit, then the aggrieved party can always sue to rescind the contract.

Article 12:

When making a contract, if there is a difference between the value of the subject matter offered by one party and the value of the consideration in return, then the aggrieved party can sue to rescind the contract on the ground that he/she never intended the difference to be a gift.

These provisions add an additional level of uncertainty to contract formation. If any contract can be rescinded for unfairness, “violating social ethics,” “undue profit,” or even a mismatch between the value of subject matter and consideration, then contracting parties are not operating in an environment of much certainty or confidence.

Although the language of the law is problematic, it has not proven an issue in reality because these provisions are not well known or commonly encountered by businesspeople. One lawyer said that, “If you don’t go to court, you can do what you agree. If you do go to court, the law is not the first thing you’re worried about.” Because many problems in the Cambodian court system have led businesspeople to generally avoid recourse to court, these provisions are rarely at issue and are likely to remain so until significant improvements are made in the court system

Cambodia is not a member of the U.N. Convention on the International Sale of Goods, and the government does not appear to consider this matter to be urgent.

C. Implementing Institutions

Publication of laws. Decree 38 has been published and is available online in English, although, like most commercial laws in Cambodia, it is hard to find.¹⁶ Most lawyers have a copy of the Decree, and most large or sophisticated commercial actors also have access to it. That said, access to laws continues to be a problem in Cambodia, according to private practitioners and observers from the donor community. There is no central repository for laws, and even though the Ministry of Commerce has improved publication of laws on the internet, the vast majority of courts and judges do not have access to that medium. As a new legal regime for contracting emerges, access to the laws and accompanying regulations will be of increasing concern.

Publication of decisions. Case decisions by courts cannot currently function as a source of law on contracts (or in other areas). For the most part, Cambodian courts do not publish decisions. In fact, Cambodian courts do not always file or record decisions.

Court decisions are often communicated to the parties only in the form of a court order, without reasoning or explanation. When there is a written decision, it is often quite brief – just a short description of the facts of the case, a citation to the relevant statutes, and a verdict. Decisions are usually not made available to anyone other than the parties to the case, and they are not

¹⁶ See a list of online laws, set forth by the Library of Congress at <http://www.loc.gov/law/guide/cambodia.html>.

consistently recorded at the court itself. Court decisions – even Supreme Court decisions – are rarely publicized, and never published. Records of past decisions are not considered public information.¹⁷

Courts. Interviewees from the private and non-government sectors did not express a high degree of confidence in the Cambodian courts. Without exception, they said that they avoid the courts when possible. Cambodia's courts lack sufficient training, staff, and equipment, and are universally perceived as corrupt.¹⁸ Even wealthy and well-connected actors, who would be expected to do well before the courts, expressed frustration with the courts' inefficiency.

Judges have little experience with complex commercial litigation. Even sympathetic users evaluate the courts as “not ready” to handle commercial contracts. In general, it is clear that the courts are not operating effectively with respect to resolving commercial contract disputes.

Arbitration. Commercial arbitration does not seem to exist yet in Cambodia, but commercially sophisticated actors are aware of its existence. At least one interviewee (a major bank) expressed enthusiasm for seeing arbitration established in Cambodia.

D. Supporting Institutions

Notaries. Cambodia's unusual notary system is significantly lacking in transparency, and a Law on Notaries did not exist as of November 2007.

The one major force in the notarial field – located in Phnom Penh – was reported in February 2006 to have a state-created monopoly over all transactions requiring notarization, including mortgages. This single notary was also the only person formally authorized at that time to certify “documents concerning a value” of more than 200,000 riels (although the state of that authorization was not readily discernable in November 2007).¹⁹

Commercial actors, both local and foreign, have responded to this state of affairs either by coming to terms with the notary or by ignoring him. Some admit to using him and to paying his fees; others say that they refuse, and “certify” their documents through an unofficial process. There appear to be several methods of doing this, ranging from going outside the country to using several witnesses, including persons known in the community to be reputable and honest. So far, these makeshift solutions – in place at both phases of this diagnostic – have worked

17 It should be noted that this is not because Cambodia is a transition economy, nor because it is a civil law country. Most civil law countries keep public records of decisions, even if they do not recognize them as binding precedent. Vietnam is a socialist civil law country, but Vietnamese courts keep records, and Vietnam began to publish Supreme Court decisions in 2005. Cambodia's lack of recording and publication seems to arise from a combination of past habits of secrecy, limited court resources, and the generally low status of the courts. In this, Cambodia resembles Laos (which also does not publish court decisions) much more than it does either Vietnam or Thailand.

18 This is similar to – but worse than – Vietnam. It is in contrast to Laos, where courts are perceived as slow, inefficient, and not very competent, but not necessarily as corrupt per se.

19 The notary – Mr. Benson Samay – consented to be interviewed for this report, but the interview was fairly brief; he refused to give specific information about his work (e.g., the number of notarizations done). He said that he could not speculate about why no other notaries had been appointed, but noted that the current system required him to be highly expert and to post a large bond. Mr. Samay's premises included three large buildings near the center of town.

because state and private actors have not insisted on official notarization. Most significantly, it appears to be possible to file mortgage documents without the stamp of the single official notary.

Nevertheless, the single notary still seems to have a powerful chokehold on contract formation in Cambodia. Since he is the only “official” notary in the country, and has no offices outside Phnom Penh, most contracts formed in the rest of the country may be considered formally invalid.

This state of affairs is inconsistent with international best practices. It would be better to allow commercial actors to develop their own system for authenticating the legality of documents, as has happened in some developing countries.

As of November 2007, plans for support of a school for notaries through the French government were said to be underway.

Law schools. Cambodia’s single public law school and various private law faculties are not yet adequately training young lawyers to draft, negotiate, or litigate contracts. This is evidenced by the poor state of legal drafting in the country. To the credit of the country’s law students, many are taking advantage of learning opportunities offered through other mechanisms, including study abroad, work opportunities with donors or NGOs, and training from a variety of sources.

Media. The media show little interest in contract law or enforcement. There is very little media coverage of contract disputes or litigated cases. The sole exception is in the area of land disputes, which can sometimes attract a great deal of public interest.

E. Social Dynamics

Contract informalism. Though estimates vary, it is clear that much of Cambodia’s economic activity remains informal. This is also true of contracts. Much business in Cambodia remains primarily relational. Oral contracts and “handshake deals” are common. Outside the cities, they are the norm. Given the conditions of the Cambodian economy, partners are often close, and transactions tend to be simple and centered on tangibles. There is some reluctance to place transactions in the public eye; it is not clear whether this is cultural, or simply a rational response to the uncertain legal environment. In any event, formal contracts are still the exception.

Written contracts are gradually becoming more common, but this is a very slow process. Form contracts are used in a few contexts (such as labor contracts and mortgages) but are still fairly rare.

Corruption and trust. It is not possible to consider contract law in Cambodia without at least alluding to the issue of corruption. Contracts are ultimately about trust. Where social trust is very low, it is difficult for contracts to be effective tools for commercial development.

Written contracts can help build trust. The investment of effort required to negotiate and draft a detailed contract can itself be an indicator of mutual trust and interest. This is the case in some other Asian countries, such as Thailand and Japan, where the purpose of a contract is less to

provide a platform for enforcement than to serve as a symbol of mutual agreement and concern. This is particularly true in Japan, where commercial lawsuits are less frequent than in the U.S. or Europe, but written contracts are frequently renegotiated anyway. This is done not so much to protect the parties as to provide an up-to-date “snapshot” of the commercial relationship.

It is at least conceivable that written contracts could evolve to fulfill a similar function in Cambodia. The experience of Thailand – a neighboring country that has also struggled with corruption, a weak court system, and poor contract enforcement, but that has nevertheless achieved sustained development – may be useful here.

Labor contracts. Cambodian labor law requires written labor contracts for all non-agricultural workers, but many Cambodian employers ignore this provision. Still, this law has encouraged awareness of contracts and contract issues among at least some employers and businesspeople. It is not clear to what extent this is true among the workers themselves.

Lawyers. Cambodia does not have a strong tradition of using lawyers for negotiating contracts or resolving disputes. There is no requirement that parties to a commercial dispute be represented by a lawyer. In dealing with contracts, the legal profession is not particularly respected or popular. Although a few lawyers have become quite wealthy, there is a perception that their wealth derives from political connections or “fixing” abilities than from legal skills. Private sector and donor interviewees confirmed this perception as of November 2007.

Private lawyers have only been allowed since 1993. In February 2006, there were fewer than 20 law firms in the entire country, and none of them employed more than five lawyers.

F. Recommendations

- Once the civil code is passed, support a campaign of public education. Public awareness of contract law and contract issues is currently very low. Again, there is a great deal of potential for donor coordination on this point.
- Support clarification of the role of notaries and support the creation of a real, modern system of notaries. While creating a notary system in Cambodia will be a challenge, it should be noted that several developing countries have remarkably good notary systems. Also, a nationwide system of notaries may help spread good commercial practices across the entire country.
- Develop alternative dispute resolution (ADR).
- Train judges in business law generally, and in contract law in particular. Although the Royal Academy of Judges is considered a strong institution, more must be done to assist judges in learning the new contract-related regime of laws.

IV. Real Property Law

A. Introduction

Real property law is crucial in market economies; it provides the legal environment for a business to own, use, and sell land and buildings as well as to use them as collateral to obtain credit. *Good* property law is especially critical in transition economy countries; a good property law enables entrepreneurs to acquire land freely to produce goods and services in a secure ownership environment, which is a necessity for planning for the long term. A good property law must also be accompanied by an objective, standardized titling system.

Cambodia's Constitution, enacted in 1993, marked the country's transition from a socialist to a market-based economy. Consistent with this, the Constitution affirmed the right to private ownership of land (Article 44). Cambodia has since adopted an extensive (and still evolving) set of land laws that are conducive to commercial activity in land. In actual practice, however, land transactions are often subject to political interference and opacity that have dampened entrepreneurial investment.

Although foreign investors are urging the government to allow foreign ownership, and a debate on this matter is underway, Cambodian land law currently limits land ownership to Cambodian citizens. There are many *de facto* forms of foreign landholding, including leasing from Cambodian owners, indirect ownership through Cambodian companies, and acquisition of land concessions (which, unlike ownership, may be held directly by foreigners). Even with these devices, however, foreign landholding is more constrained and less secure than in full market-economy countries or than it should be for optimal future economic development in Cambodia.

Cambodia has never had a reliable, standardized system of land titling, but that is changing. An in-progress donor-assisted comprehensive long-term survey and titling project will ultimately cover much of the significant commercially usable land in Cambodia. However, even that is slowed by the significant number of title disputes, many of which involve political issues.

B. Legal Framework

The underlying legal framework is the **2001 Land Law, Royal Decree No. NS/RKM/0801/14**. That law is an overarching statement of general principles following civil law (principally French) models; it was drafted over several years with foreign-expert and local-donor input and with extensive review by Cambodian authorities (including the Cambodian Council of Jurists, the Ministry of Land Management, Urban Planning and Construction, and parliamentary commissions).

Because it is so general, the law has been supplemented by a considerable number of regulations on specific subjects. These include sub-decrees on: organization of the Ministry, establishment of a Cadastral Commission, the land mapping and registration system (discussed below), construction permits, economic concessions (also discussed below), and state land

management.²⁰ When the 2001 Land Law was enacted, the government recognized that considerable follow-up was needed and, to that end, the Council of Ministers adopted a *Strategy of Land Policy Framework* in September 2002, which acknowledged that “several necessary legal acts are still missing, allowing chaotic situations to go unresolved.” Among those they identified are poor knowledge of land rights among Cambodian people, unclear boundaries for state public and private land and concessions, and lack of a land valuation system (which constrains both tax collection and private land markets).

An abbreviated history of Cambodian land law helps to illuminate some of the basic concepts of the 2001 Land Law. Historically, before France assumed administrative control of Cambodia (in the 1860s), the *ownership* of all land was the King’s. However, the law recognized a private right of *possession*, which a private person could acquire by occupying and using the land, and which such a person could then sell or otherwise dispose of. During the French administrative period (which ended with independence in 1953), a French-style Cambodian Civil Code was adopted. This code abolished King/state ownership, but retained the old concept of “possession,” making it the means for acquiring private ownership land. That code and those concepts remained in force after Cambodian independence (1953) up to the Democratic Kampuchea (Khmer Rouge) period of 1975-79. In that period private ownership was abolished and land ownership records were destroyed en masse, a condition that essentially continued through the Peoples’ Republic of Kampuchea period (1979-89).

Thus, both land ownership and land records were in a state of chaos when the new State of Cambodia was created in 1989. The first effort to deal with this was a new Land Law enacted in 1992, which restored the former Civil Code concepts of private ownership and of possession leading to private ownership. The current 2001 Land Law greatly expands on and replaces the 1992 Land Law.²¹

Land Ownership. The 2001 Land Law establishes as its basic principle that “only legal possession can lead to ownership” of land (Article 6). However, *establishing* possession is now both more difficult and more important than ever because of the mass destruction of records and the need for a clean break with the prior period.

The 2001 law prescribes strict rules for acquiring ownership through possession:

- Ownership can be acquired only through “*legal possession*,” which is defined as continuous, peaceful, and uncontested possession of the land in question *for no less than five years prior to the promulgation of this law*” in 2001, *except* that if the possession started before the promulgation of this law, “the competent authority” can recognize the portion of the five years that runs afterward (Articles 30, 31 and 38).
- Ownership or claims relating to periods before 1979 “shall not be recognized” (Article 7).

20 These laws and regulations through 2004 were collected under the auspices of the Ministry of Land Management, Urban Planning and Construction and published on a CD with support from East West Management Institute (EWMI), the Asian Development Bank (ADB), Deutsche Gesellschaft fuer Technische Zusammenarbeit (GTZ), Finnmap (an agency of the Finnish Government), and the Cambodian Legal Research Development Center (CLRDC).

21 Details of this history together with a very useful analysis of the 2001 Land Law are contained in *Land Law of Cambodia: A Study and Research Manual*, prepared by EWMI supported by the ADB and published in November 2003.

- However, once ownership is acquired, it can be titled and publicly recorded; it can be sold or leased; it can be transferred by exchange, gift or succession on death (Articles 7, 30, and detailed in 63-84); and it can be mortgaged to secure debt repayment (detailed in Articles 197-204).
- Ownership can only be acquired from state private land (Article 43), which is defined to include land other than forests, navigable rivers, land for roads, property used for a public service such as schools or administrative buildings, property that constitutes a natural reserve protected by law, and cultural patrimonies, etc. (Article 16).
- Finally, “only natural persons or legal entities of Khmer nationality have the right of ownership” (Article 8).

As might be expected, thousands of disputes have arisen in applying these rules. Land disputes constitute most of the Cambodian courts’ total caseload. In light of these circumstances, procedures for non-judicial adjudication of land title disputes have been established in the land titling project described below.

Landholding by foreigners. The domestic ownership limitation has complicated but not prevented foreign investment. Foreign holders of, and dealers in, commercial land made it clear that there is an active market including foreigners in both commercial and residential properties. The most common device for foreigners is to lease from a Cambodian citizen or the state, which is explicitly contemplated in the 2001 Land Law (Article 106). Both short- and long-term leases are available (there is no legal upper limit on duration) and lease structures appear to be about as varied and negotiable as they are in the West. Other methods involve use of Cambodian-registered companies, which under the Land Law are considered Cambodian-registered if 51 percent or more of the shares are Cambodian-owned (Article 9). The Cambodian company law permits multiple classes of company shares, which can also facilitate landholding; a Cambodian-citizen shareholder may own 51 percent or more of the shares while another shareholder may own a minority of shares that, however, represent a majority of the investment and carry control and dividend entitlement. Another popular method is for a Cambodian citizen to hold legal title for the benefit of himself and a foreign holder under arrangements analogous to trusts in the West. However, this requires personal trust and a relationship with the Cambodian citizen and it is not normally workable for new foreign investors. Another method is for a foreign investor to become a Cambodian citizen, which is possible under Cambodian law for investors of significant amounts in Cambodia (and whose native-country laws do not prevent this). Several examples of this were cited involving investors from other Asian countries.

Documentation of significant transactions involving foreigners is typically done with professional legal advice and is sometimes lodged with village, commune, or other government authorities to provide additional weight and recognition. It was pointed out that disputes regarding leases and trust agreements can happen and that, when they do, there is not an efficient state mechanism in the courts or otherwise to resolve them. The risk is underlined by a provision in the 2001 Land Law that “a foreigner who falsifies national identity to become an owner of land in Cambodia shall be punished” and “any property bought under these circumstances will be seized as state property without compensation from the state” (Article 8).

Land concessions. A different means for acquiring Cambodian land is the *concession*. Concessions under the 2001 Land Law are of two kinds: *social concessions* intended for poor and displaced families for agricultural or residential use²² and *economic concessions*. Those are not the only types of concessions that may be granted. The 2001 Land Law states that “there may be several other kinds...whether or not related to rendering a public service,” such as mining, port, airport, industrial development, and fishing concessions, and that “these do not fall within the scope of the provisions of this law” (Article 50). It should be noted that such “other kinds” also are not subject to the rules and protection of the 2001 Land Law or of the Sub-Decree on Economic Concessions described below.

The basic rules governing economic land concessions under the 2001 Land Law are that they:

- Are issued “by the competent authority, such as the state” – they “can never result from occupation of the land” (Articles 48 and 53)
- “Allow the beneficiaries to clear the land for industrial agricultural exploitation” (Article 49)
- May be issued to foreigners as well as Cambodians
- May not cover more than 10,000 hectares
- Must be paid for (“may not be gratuitously granted,” Article 51).

Concessions have been used for some of the largest and most lucrative land grants in Cambodia and have been the subject of great controversy. It has been claimed that they are often used for illegal logging under the guise of being projects for “legitimate” purposes such as acacia, rubber, or other agricultural plantations. Logging itself has been the subject of great controversy; it is one of the principal sources of income from land use, but has caused environmental damage and displacement of people, and it is the subject of an official embargo effected in 2003. It is also said that concessions are issued without public notice, bidding, or other transparency to persons with political influence; that the true owners are often undisclosed and unknowable; and that concessions often cover areas larger than the 10,000 hectares permitted by the 2001 Land Law. Cases have been cited involving displacement of poor farmers, and encroachment on the “slash and burn,” crop-rotation, and other communal lands that provide the livelihood of indigenous peoples.

Such controversies helped lead to the December 2005 adoption of a new sub-decree by the Council of Ministers, the Sub-Decree on Economic Land Concessions, No. 146 ANK/BK. That sub-decree prescribes detailed procedures and protections that were drafted with claimed abuses in mind. The requirements of the sub-decree include:

- A concession must meet the following criteria: it may be granted only on state private land in accordance with the Sub-Decree on State Land Management; that a land use plan has been publicly adopted; that environmental and social impact assessments have been completed; and that there is no involuntary resettlement without public consultation.
- Evaluation of a concession must be based on factors such as increase in agricultural production and increase in employment.

22 Land Law Article 49. A Subdecree was issued in 2003 prescribing highly detailed procedures for social concessions. Subdecree on Social Land Concessions, ANK/BK/19, March 19, 2003.

- Detailed formal steps and documentation are required.
- Public notice, a business plan, and sealed bidding are required.
- Finally, economic concessions granted prior to issuance of the sub-decree are to be reviewed in light of the sub-decree's requirements.

This sub-decree followed complaint and donor pressure, and it has been said that the above-described rules represent exactly what has *not* been happening in the past. Its implementation is critically important in avoiding past abuses.

Survey, titling, and registration of title. A major factor inhibiting land markets in Cambodia is the absence of a reliable, standardized survey and titling system. The need for this is recognized in the 2001 Land Law; it establishes that “ownership of [land] shall be guaranteed by the state.” The 2001 Land Law requires cadastral registration for land sales (Article 69), and establishment of a Cadastral Commission under the Ministry of Land Planning, Urban Planning and Construction (Articles 226-246), with duties to undertake mapping, register all owners' names, issue title certificates to owners, register mortgages and easements, and establish a register showing that such are up to date. The Cadastral Commission is also to have provincial/municipal and village offices to conduct surveys and mediate land disputes.

Land titling is now being implemented by a comprehensive project – called the Land Mapping and Administration Project (LMAP) – being managed by GTZ and Finnmap with the support of the World Bank. The project began in 2002 and is currently expected to finish in 2014. Title is established in two ways: on request of an individual land holder, and systematically by covering a selected large area totally (which is more efficient and cost-effective). The latter is currently being done in rural and outlying urban areas; the former primarily in cities on the request of particular landholders who wish to make their ownership marketable. Thus far the project has operated in 11 of the 23 provinces; it contemplates that, when finished, six million titles will have been established, of which now a level of 200,000 per year has been reached with a target of one million by 2007. A person receiving a title pays a fee subsidized by the World Bank. In a typical case, establishment of a title involves two to four months of data collection, interviews with neighbors and village chiefs, and 30-days' posted public notice for objection.

Disputes are common and for these a non-court, three-stage adjudication procedure has been established and administered by the Cadastral Commission (which is part of the Ministry of Land Management, Urban Planning and Construction). At the district (lowest) level, it involves mediation only (peer and neighbor interviews and objections). At the provincial (second) level, it involves further mediation. Thereafter, an appeal may be made to the National Cadastral Commission, which alone can decide a dispute. Courts are almost never used as an alternative to this process; they are viewed as slower and less independent.

The LMAP project also has a valuation component for developing accurate valuation of land for tax purposes. The project will ultimately result in publicly filed map and owner indexes for all land covered, and the land will be registered and guaranteed under a German-model cadastral system (similar to a Torrens system as used in Australia and many U.S. states) in which registered ownership is not subject to question, making such devices as title insurance and lawyers' title opinions unnecessary.

It was said that the process – including dispute resolution – is working very well in cases involving possessors of land who have equal social and political status, such as poor vs. poor and businesses without political connections. It was further said that the process does not work when title entitlement is disputed by a person with influence; when that happens, a dispute about land possession can turn into a political issue. In such cases the project has found that the only course is to step back and avoid the area in question, leaving it untitled and “open” on the map. This is a major but perhaps inevitable failing in the system. It results in significant areas not being titled at all.

C. Implementing Institutions

Ministry of Land Management, Urban Planning and Construction. The Ministry has primary authority for administering the 2001 Land Law, issuing larger economic concessions under the 2005 Sub-Decree on Economic Concessions, creating and managing the **Cadastral Commission**, and issuing and recording land titles. The creation and management of the cadastral system includes the immensely important task of administering the title dispute resolution system. The Ministry suffers from an acute shortage of personnel and expertise in these areas; this has been recognized, and the LMAP project includes capacity-building activities to remedy the shortage.

Other Ministries, the Council of Ministers, and Provincial Governors. Other bodies have widely varying and not always clearly delineated responsibilities and powers relating to land. Ministries other than the Ministry of Land Management, Urban Planning and Development may grant concessions other than those that qualify as economic concessions under the Land Law and the Sub-Decree on Economic Land Concessions. The Council of Ministers has power to grant some exceptions to the 10,000 hectare size limit for economic concessions (Sub-Decree on Economic Land Concessions, Article 39). The relevant provincial/municipal governor has authority for granting economic concessions with investment value of less than 10 million riels and an area of less than 1,000 hectares (Sub-Decree Article 29).

Council of Jurists. The Council of Jurists is the state-appointed body with final responsibility for vetting and revision of new Sub-Decrees and other regulations before they go to the National Assembly and the Prime Minister for enactment.

D. Supporting Institutions

Private lawyers, accountants, and other professionals. As pointed out earlier, lawyers and other professionals are useful in dealing with property and are important in structuring, documenting, and dealing with state officials in facilitating land transactions.

Courts. As stated above, land disputes currently constitute most of the courts’ caseload, but the courts are generally viewed as slow to decide and lacking in independence.

Media. The **print media** is increasingly free in Cambodia and will serve as an important watchdog in the area of land disputes. **Television** continues to be dominated by the state and may not play a sufficiently objective role in the sensitive topic of land titling over the next few years.

E. Social Dynamics

Cambodian law clearly encourages private land ownership. Cambodia has also been hospitable to the development of a detailed legal infrastructure that is conducive to private land ownership and to an active market in private land transactions.

However, persons interviewed stated that the real problems are not with the formal laws but by the pervasiveness of political influence and opacity in land transactions and land ownership. The examples mentioned earlier relating to granting of concessions and to area-avoidance in land titling point to this. Other examples referred to were sales of state public land to unidentified buyers contrary to the prohibition of such sales in the 2001 Land Law (Article 16), expropriation of land allegedly without adequate compensation as is required by the Land Law (Article 5), and suddenly declaring land to be state public land (which under Article 16 cannot be acquired through possession) when ownership was sought by farmers who had been occupying and cultivating it. Also cited were land swaps in which well-connected persons obtained valuable state public property in exchange for a commitment, not always met, to build a replacement of such public property on the outskirts of the city where land is less valuable. There have been reports that this device has been used with the Ministry of Justice building, the municipal police headquarters, and the Royal University of Fine Arts in Phnom Penh.

It should be pointed out that these problems are not a secret; they have been referred to in newspaper articles, and some of them were declared to be a major issue in the 2002 *Strategy of Land Policy Framework*. Taken together, they must be listed as a major – perhaps the greatest – problem relating to land law in Cambodia.

F. Recommendations

- Monitor the implementation of the 2005 Sub-Decree on Economic Concessions and clarify the jurisdiction and rules for granting of economic concessions by ministries and bodies other than the Ministry of Land, Urban Planning and Construction. Expand the scope of the sub-decree to include all concessions issued for economic use by any ministry or other government body.
- Encourage investment in Cambodia by making the rules and procedures for land use by foreign persons simpler, more transparent, and more secure. Consider the following:
 - Allowing certain foreign persons (such as long-term residents and persons or companies making investments over a stated amount) to have land use rights the same as or similar to those of Cambodian citizens.
 - Issuing a formal regulation or law clarifying matters about which there may now be uncertainty, such as rules for: foreign ownership of buildings and other attachments on land; companies or joint ventures that are partly foreign-owned; and the holding of land by Cambodian citizens for the benefit of foreign persons.
 - Eliminate or reduce investment license requirements for foreign holding of residential property.

- Establish training programs for State, Provincial, District, and Village officials on all of the above.
- Continue and encourage expansion of the titling project.

V. Secured Transactions Law

A. Introduction

In May 2007, Cambodia enacted a very sound and progressive secured transactions law. Although there is little secured transactions practice at this time, the construction of a new online registry for secured transaction aims to change this fact. With ADB support, implementation of the law, including training of implementers and stakeholders, has begun.

B. Legal Framework

Cambodia is still, to a great extent, a cash-based economy. In the manufacturing sector, only 28 percent of all firms have any loans at all. Only nine percent of service firms and just six percent of trade firms have loans. The 2003 World Bank PICS survey found that less than five percent of small and micro-firms have formal credit of any sort, including trade credit. There is simply not much formal credit and lending in the Cambodian economy today.

Cambodia's newly enacted secured transactions law aims to change this and bring greater access to credit into the Cambodian economy. The new law is the result of an ADB project as part of the ADB's Financial Sector Blueprint for Cambodia.²³ The law was drafted in cooperation with the Ministries of Justice and Commerce, and received a fair amount of stakeholder input.

Unfortunately, the donors do not agree about the efficacy of the new law; the creation of a registry is perceived by certain observers as conflicting with the draft civil code. Yet the Ministry of Commerce appreciates the potential of the new law and is committed to its implementation.

The new law allows security interests to be created and filed with minimal formalities. Under the law, collateral may be movable property of any nature, tangible or intangible, current or yet to be acquired. A single agreement may create security in collateral that arises in the future, saving the expense and formalities of amending contracts. The law also distinguishes between several forms of collateral, including equipment, inventory, accounts, agricultural products, and consumer goods. It covers multiple forms of financing, including equipment financing, accounts financing, consumer financing, secured sales contracts, purchase money security interests, and chattel paper (including warehouse receipts).

Other salient points of the law include:

- Clear rules for priorities
- Default clauses that can be contracted around, if both parties are willing
- A duty of reasonable care in the use and possession of collateral, consistent with the Cambodian tort law and civil code
- Multiple methods of perfection, by possession, filing, or attachment, depending on type of goods and circumstances

²³ The Blueprint is a comprehensive ten-year plan for financial reform in Cambodia, covering the period from 2001 to 2010. At the time of this Diagnostic, it was undergoing a mid-term review.

- Multiple remedies, including the right to take possession and dispose of collateral, in addition to other remedies provided by law
- Reasonable consumer protection provisions, such as a prohibition on the use of individually owned consumer goods and personal effects for collateral²⁴
- Consistency both with existing law and with the draft Bankruptcy Law.

The law also created a Filing Registry Office within the Ministry of Commerce. This office is designed to allow quick and simple filing, including internet filing. Fees would be minimal, and the law would encourage very swift processing of filings.

The enactment of the new law coincides with an ongoing, ADB-supported drive to create a filing registry. If the registry is successfully implemented, then Cambodia will have the essential elements of a modern secured transactions system.²⁵

Nonetheless, while these will be very positive developments, there are reasons to believe that there will not be a sudden or rapid improvement in the current situation. First, there is no firm schedule for training judges in the new law. Thus, it may be some time before the courts are competent to implement the law. Second, Cambodia's court system suffers from broad and deep deficiencies in funding, staffing, and training, and is widely perceived as inefficient and corrupt. Even with adequate training, it will not be easy for the court system to implement and enforce the new law, nor for stakeholders to trust it to do so.

Third, it is not clear how well the Filing Registry Office will function. The Office will be located within the Ministry of Commerce, and the Ministry has made a strong commitment to moving forward with its integration. However, the experience of existing registries in Cambodia, –the Land Registry in particular – is not encouraging. Low salaries, lack of equipment and training, and the influence of informal fees are endemic problems. It is unlikely that the new system will solve them altogether. This may be a minor problem or a crippling one, depending on what resources donors make available and how committed the government is to this reform.

Fourth, Cambodia's banking system is conservative and extremely liquid. As of February 2006, the banking system had about \$900 million in deposits, but only about \$500 million in loans. The standard product is a large commercial loan, secured by a mortgage on land. The Cambodian banking system does not use many financial products that are common in developed economies – finance leasing, for instance, or factoring. In February 2006, most banks exhibited little interest in making loans secured by movable property or intangibles, although this may change significantly over time. In general, banks are not considered major drivers of reform in Cambodia;²⁶ accordingly, they are unlikely to move quickly to use the new law, even if the other conditions for its use are in place.

24 This is important in a legal environment where many consumers may be unfamiliar with commercial law. Otherwise, unscrupulous lenders could ask for a security interest in all the borrower's personal possessions, including his furniture and the clothes on his back.

25 It must be noted that this effort is already more than two years behind schedule. The law was originally supposed to be passed, and the Registry deployed, in early 2005.

26 There are two interesting exceptions. ANZ Royal Bank (a new entry into the Cambodian banking market) and ACLEDA Bank (formerly a microfinance institution) have both expressed an interest in using secured financing. Both these banks are using business models that differ significantly from the norm in the Cambodian banking system. They are aggressively seeking out new products and new markets, and want to import international techniques and best practices. In this they both

C. Implementing Institutions

The new secured transactions law creates a filing registry within the Ministry of Commerce, and the ADB is committed to supporting it. Although registries are difficult to start up, they are inexpensive to run. Once set up, a registry tends to be a net profit center, providing a modest but steady flow of income. As of June 2006, filing office hardware and software had been purchased and installed and staff had been trained although, commensurate with implementation of the new law, further training is taking place.

The **courts** are very seriously flawed, and public trust in them is low. It is questionable whether secured transactions will ever be able to play a major role in Cambodia's economy without at least some improvement in the court system.

D. Supporting Institutions

Banks show only minimal interest in secured transactions. Due to distrust of the court system and problems with debt enforcement generally, Cambodian banks only like to lend on land collateral. The banking sector generally is conservative, and they must deal with a very challenging environment that includes the notoriously weak court system, unreliable law enforcement, lack of reliable borrower information, high operating costs, low levels of transparency, poor credit culture, and a very limited supply of trained personnel.

The result is the region's lowest level of intermediation and a banking sector that rarely offers more than a very limited menu of products and services. The standard model for commercial loans is of heavily over-collateralized loans secured by land and buildings. This seems unlikely to change in the near future.

Microfinance institutions (MFIs) have expressed some interest in secured lending. MFIs are widespread in Cambodia, and the microfinance sector is vigorous and growing. However, the limited resources of most MFIs mean that this sector is not likely to be an aggressive first user of the new law.

In the past, **notarial services** have been executed through a formal state-granted monopoly, although, as of November 2007, this appears to have changed. Significantly, the new secured transactions law will not require notarization for creating secured transactions, nor for filing.

Local lawyers, accountants, and business consultants have little understanding of, or interest in, secured transactions. Some foreign law firms and accountancies are present in Cambodia, and are aware of the potential of secured transactions and other forms of finance.

differ sharply from the rest of the Cambodian banking system. As noted, most Cambodian banks are very conservative, and seem entirely content with the current system of large, over-collateralized, mortgage-backed loans and very high liquidity. Together, ANZ Royal and ACLEDA account for roughly 20 percent of the market. While they are not big enough to dominate the sector or be drivers for reform, any reform efforts in this area should at least touch base with these two banks.

Local professional associations – in particular associations based outside of the capital – and **local trade and special interest groups** do not have committees dealing with collateral or other finance issues. They do not regularly provide input on laws, nor does the government solicit or accept input from groups with relatively small or less powerful constituencies (except occasionally when encouraged to do so by donors).

The **garment industry** is a major potential market for secured finance. At this time, the Cambodian garment industry is financed either by foreign capital or by the usual over-collateralized mortgages. Much of the industry is foreign-owned; some of it is also vertically integrated, with the Cambodian factory purchasing raw materials from the mother firm. This avoids much of the need for financing. However, factories not in this situation are relatively disadvantaged, as is the garment sector as a whole.

Auctions of movable property do not exist in Cambodia. Auctions of land do occasionally occur, but it is just as common for land to simply be held and managed by the forecloser. Several Cambodian banks own and manage large commercial properties.

The public **law school** does not teach a course on secured transactions. The **media** do not play any role at all. In general, there is little public awareness of secured transactions as a commercial tool (although pawnshops and village money lenders are both common).

E. Social Dynamics

The need for greater access to finance, particularly on the part of small businesses, is clear. The lack of capacity and ownership within the business associations and small businesses themselves must be a consideration when the time comes to publicize and educate people about the new options in access to capital that will materialize upon enactment of a new secured transactions law.

F. Recommendations

- Support the new Filing Registry through public outreach, capacity building, and education of constituencies throughout the country.
- Provide judges with comprehensive training in the new secured transactions law, with respect to both concepts and procedures under the new law and the underlying principles of secured credit in a market economy. Judicial training should be a high priority.
- Encourage public education in secured transactions and other modern forms of financing, including seminars and conferences for bankers, lawyers, businesspeople, and accountants as much as for the general public.
- Investigate cooperation with the ADB on other aspects of the multi-year blueprint for bolstering Cambodia's financial sector. While most of the plan is not directly relevant to secured transactions, it is worth mentioning in this context. The plan appears to be well thought out, and some aspects of it (such as institutional strengthening at the National Bank) have already had a clear positive effect.

VI. Bankruptcy Law

A. Introduction

The National Assembly approved a draft insolvency law in the fall of 2007. Ultimate enactment of this law – which is expected in the near-term (and may have taken place by the time of this report’s publication) – will support the much-needed emergence of an insolvency practice in Cambodia over the long-term.

B. Legal Framework

Creditors are not currently well protected in Cambodia. Business failures lead to a scramble between shareholders seeking to make away with business assets, and creditors attempting – usually unsuccessfully – to secure them. This leads to increased uncertainty and risk in lending, which in turn tends to dissuade domestic and foreign investors.

The government has never issued decrees or guidelines for dealing with insolvency. To date, there has been no system of priorities beyond a “race to court” – and even this is not consistently enforced, as a later creditor may be able to use political influence to jump the line ahead of earlier creditors.

The recently passed insolvency law is the result of an Asian Development Bank (ADB) project that began in 2004. The law was written in cooperation with the Ministries of Justice and Commerce and received a fair amount of stakeholder input.

The law is a fully modern bankruptcy law. It includes a clear hierarchy of creditors’ rights, clear powers and duties of administrators, and a rehabilitation process for saving viable businesses. Unlike the laws of some nearby countries – most notably Vietnam – it does not assume or emphasize a link between bankruptcy and incompetence or criminality. Final enactment of the law will be a significant step forward.

However, there is not yet a firm schedule for training judges and administrators in the new law. Also, plans for regulation of administrators have not fully taken shape. Most countries with working bankruptcy systems have associations of administrators, with ethical codes, minimum requirements of competence, and examinations or other methods of ensuring professionalism. Cambodia does not have such a system.

Additionally, Cambodia’s court system suffers from broad and deep deficiencies in funding, staffing, and training, and is widely perceived as inefficient and corrupt. It will not be easy for the court system to implement and enforce the new law, nor for stakeholders to trust it to do so.

However, there is some cause for cautious long-term optimism. Unlike its socialist neighbors, Cambodia has relatively few state-owned enterprises, and no state-owned banks (SOBs). This will eventually make bankruptcy practice easier, as there will not be as much political pressure to keep large state-owned enterprises (SOEs) out of bankruptcy. Furthermore, modern accounting

practices are slowly becoming the norm, which suggests that there will eventually be a core of trained personnel capable of bankruptcy administration and other acts implementing the new law.

On the other hand, continued perceptions of widespread corruption means that tunneling and fraudulent conveyances are likely to be major problems. In addition, the perceived unreliability of the courts will discourage creditors from using the law. If nothing else changes in Cambodia's commercial environment, it is unlikely that the law, however well written, will have much effect.

C. Implementing Institutions

Courts. The courts are not ready to handle major bankruptcy cases at this time. Cambodia's courts lack sufficient training, staff, and equipment, and are universally perceived as corrupt. Furthermore, judges have little experience with complex commercial litigation. As of November 2007, a draft law for commercial courts was attracting stakeholder input and consideration. Enactment of this law in 2008 has the potential to bolster public confidence in the ability of courts to handle insolvency procedures.

Administrators. The concept of bankruptcy administration remains extremely unfamiliar in Cambodia. Although it would be possible to train bankruptcy administrators, and the government is reportedly working on such training, it must start from scratch. Furthermore, there are not many people in Cambodia with the necessary commercial and administrative competencies to administer large or complex bankruptcies. On the positive side, Cambodia uses international accounting standards and there is a growing community of Cambodian accountants and business professionals who would be capable of overseeing bankruptcies, given suitable training.

Such training would have to be designed with care. Cambodia's business environment is unusual and challenging. The private sector perception is that corruption permeates business-to-government interactions at all levels, and the weakness of the court system would complicate the task of administration.

Creditors. Unlike neighbors Laos and Vietnam, Cambodia has no SOBs, which is a positive sign for bankruptcy law because SOBs tend not to be aggressive creditors.

Cambodia's private banks are somewhat unusual in that they are extraordinarily liquid. As of February 2006, the banking system as a whole had about \$900 million in deposits, but only about \$500 million in loans. Commercial lending is so risky that banks are content to let much of their money sit with the National Bank, collecting a modest interest rate.²⁷ Financial products are very limited. There is no consumer finance and few personal loans. Most bank loans are commercial loans; they tend to be secured by land, and are often heavily over-collateralized.

27 In 2005, banks have been able to receive a guaranteed 2-2.25 percent from deposits with the National Bank of Cambodia. The NBC, in turn, does not seem to strongly encourage more bank lending. This appears to be at least partly from simple caution; the NBC lived through the Asian financial crisis of 1998, and so is inclined to err on the side of conservatism. That said, they acknowledge that the current liquidity ratio is remarkably low, and should rise.

Typically, the bank will be the only secured creditor, and the entire debt will be secured by immovable property. This does not give private banks a strong motivation to push insolvent debtors into bankruptcy proceedings.

Businesses may also have individual creditors. However, individual Cambodians tend to be wary of the courts. There is a strong perception that the courts are a venue in which the rich and well-connected can impose their will. Most private sector representatives interviewed for this report expressed polite skepticism that, for instance, a formal system of priorities could stop a powerful creditor from advancing to the head of a line of creditors. This skepticism is pervasive and will be a factor in implementing the new law.

D. Supporting Institutions

Lawyers. The general standard of commercial legal practice is not high, and the absence of a bankruptcy law in the past means that few, if any, Cambodian lawyers have direct experience in the field. There has been no legal education in bankruptcy. A few lawyers have worked abroad or work with foreign firms, and so have some idea of what bankruptcy practice entails.

Appraisers/valuation professionals. There are no appraisers or valuation professionals. While accountants could provide valuation services, there are no professionals trained in appraising business assets. Furthermore, Cambodia has no tradition of commercial auctions.

Company registers, tax authorities, and other local agencies. Although statistics are maintained concerning the registration of new businesses, Cambodia currently does not have a means of monitoring the “disappearance rate” of new firms.

The media. Formal insolvency is rarely, if ever, discussed in the media. Training of journalists would be a worthwhile addition to the public outreach efforts associated with a new insolvency law.

E. Social Dynamics

As of November 2007, there is very little understanding of what bankruptcy is and what purpose it serves. This is true of all but a few very sophisticated actors. Most businesspeople have no concept of bankruptcy beyond liquidation.

Unlike Laos and Vietnam, however, there does not seem to be much stigma associated with the concept of bankruptcy.²⁸ In those neighboring countries, bankruptcy is associated with criminal conduct or managerial incompetence. In Cambodia, this does not seem to be the case.

Over-collateralization. Most businesses have only one secured creditor because banks have a strong tendency to over-collateralize. This is a reasonable response to the high-risk lending environment.²⁹

28 See the CLIR reports for these two countries. The stigma appears to be quite strong in Vietnam, while somewhat less so in Laos.

In practice, it means that a business has at most one mortgage (lending on movables is almost unknown). This in turn means that the power of life or death for a business lies in the hands of the bank holding the mortgage. If the bank decides to foreclose, the over-collateralization means there is not likely to be much left for the unsecured creditors.³⁰ Thus, nobody has a strong incentive to start a bankruptcy action. The bank can collect its money through a simple foreclosure action, while the lesser creditors will get little or nothing once the bank has taken the land and buildings.

F. Recommendations

- Support final enactment of the bankruptcy law. Previous commercial laws have tended to pass (or not) based as much on perceived donor support as on actual utility.
- Given that the new bankruptcy law is almost ready, donors should aggressively and proactively coordinate their efforts. At the moment, only the ADB seems to be involved. Other donors can and should support implementation and institutional strengthening.
- A bankruptcy law is useless without administrators. Administrator training should begin well in advance of the passage of the law, and efforts by the government to develop such training should be supported.
- A framework for regulation of administrators should also be put into place. Cambodia has a history of state-granted monopolies or oligopolies of legal services,³¹ so this should be a high priority.
- Judges should receive comprehensive training in bankruptcy law, with respect to both concepts and procedures under the new law and the underlying principles of formal insolvency in a market economy.

29 This tendency is present in both Laos and Cambodia but it is even more exaggerated in Cambodia, perhaps because the court system is perceived as even weaker and less reliable.

30 In theory, the bank would foreclose, sell the property for market value, and then give the rest back to the debtor for distribution to the other creditors. However, “market value” is a slippery concept in a country where there are few real estate brokers and no auctions. In practice, a foreclosing bank is likely to offer the property for sale to the first buyer who can pay the outstanding loan amount plus costs.

31 See, e.g., the discussion of notaries in this report’s chapter on Contract Law and Enforcement.

VII. Competition Law and Policy

A. Introduction

The government of Cambodia has been engaged in efforts to adopt a competition law for some time; however, as of November 2007, this law had not been enacted. In June 2005, the Ministry of Commerce established a Working Group on Competition to oversee the drafting and adoption of the law. The overarching goal of adopting a competition law is to create a regulatory framework to maintain and improve efficiency in markets and enhance consumer welfare.³²

Achieving these goals will prove challenging, particularly because state intervention – though in many forms obscure and indirect – continues to play a paramount role in shaping the economic institutions of the country.³³ Interviews with private sector and non-government organization (NGO) representatives suggest that a close relationship with the government is essential for succeeding as an entrepreneur. This feature of the Cambodian economy will make adoption and enforcement of an effective competition policy difficult, and necessitates caution in designing both the law and the implementing institution.³⁴

B. Legal Framework

There is currently no comprehensive competition law in Cambodia. However, certain laws have competition-related provisions. The Constitution, for example, establishes a market-based economy³⁵ and requires the state to respect markets in order to guarantee a better standard of living for the Cambodian people.³⁶ Bid-rigging and other collusive behavior is prohibited by the Procurement Law and is punishable by both criminal and civil penalties.³⁷ The Investment Law guarantees that the government will not impose price controls on products or services of those

32 Competition law by itself does not create competition, but, when effectively applied, can counteract the dangers of private anticompetitive behavior. For example, cartels result in consumers paying inflated prices for goods. Dominant firms may abuse their market power through, for example, preventing the entry of new participants by pricing below cost and recouping their losses once they have successfully blocked entry by a new firm. In addition to private conduct, competition law can be used to counteract inefficient government regulation and promote efficiency within the public sector which, if properly exercised, promises enormous benefits to consumer welfare in Cambodia. For example, the Cambodian competition authority could provide suggestions and advice on government policies and measures to promote competitive practices and efficiencies.

33 According to a 2004 Consumer Unity & Trust Society (CUTS) report, “The real tension underlying Cambodian politics is that the country is still controlled by the same forces that ran the country in the 1980s as a single-party communist state.” Peter J. Hammer, “Competition Law in Cambodia” at 4, <http://www.cuts-international.org/res02.doc>.

34 This Diagnostic builds on previous work conducted under the European Union’s Multilateral Trade Assistance Project (EU Multitrap), in cooperation with the German Technical Cooperation (GTZ). In particular, this Diagnostic relies on two reports, *Preparing for a Competition Law: An ‘Economic Mapping’ of Cambodia*, by Geoffrey Sumner, June 2005; and *Preparing for a Competition Law: Legal Inventory*, by Professor Ly Chantola of the Royal University of Law and Economic Sciences of Cambodia, 2005. This Diagnostic also relies on related reports funded by CUTS, one prepared by the Economic Institute of Cambodia in May 2005, *Country Report on the Competition Scenario in Cambodia* (“CUTS Country Report”), and Hammer (2004), *op. cit.* The authors are particularly grateful to Sven Callebaut from the Phnom Penh UNCTAD office for his generous support and cooperation.

35 “The Kingdom of Cambodia shall adopt the market economy system.” 1993 Cambodian constitution, Art. 56.

36 *Id.* at Art. 63.

37 Anukret Governing Public Procurement in the Kingdom of Cambodia, June 25, 1995, the Implementing Rules and Regulations Governing Public Procurement, June 8, 1995; and Prakas on Organization and Functioning of the Department of Public Procurement, February 18, 1997.

who comply with the law, and provides for equal treatment of domestic and foreign investors.³⁸ Legislation governing the privatization process guarantees transparency and fairness, and seeks to prevent ill-gotten private monopolies.³⁹ In addition, certain sectoral laws have competition-related provisions. The Electricity Law, for example, holds as one of its guiding principles “the establishment of competition wherever feasible within the electric power sector.”⁴⁰

To date, many of these competition-related provisions do not appear to have been enforced. Instead, the government appears committed to promoting competition through the dismantling of international barriers to trade and by adopting a comprehensive Competition Law. No draft was available as of February 2006, but interviews, presentations, and previous policy recommendations outlined the basic elements that the competition law is likely to include. While the law can provide an important start toward the further development of competition policy in Cambodia, certain proposals for the draft law may merit reconsideration.

Goals and objectives. Interviews and previous policy recommendations suggest that the government may include objectives in the purpose of the competition law that encompass goals beyond core competition-based objectives, e.g., the protection of consumer welfare and promotion of economic efficiency. However, including additional goals would widen the scope of the law and increase the analytical complexity of any competition review. This is particularly the case if broad policy areas, such as national trade and economic development, are identified as competition policy goals. The inclusion of such overarching policy goals within the competition review may result in undermining the benefits that sound application of a competition law might otherwise deliver and may also jeopardize the independence of the competition authority by increasing the opportunity for political influence in competition analysis. Promoting a number of objectives in the competition field also increases the risk of inconsistent outcomes in individual competition cases, both with respect to the review of similar cases within a country and with regard to the review of the same case by two or more countries. For these reasons, the inclusion of non-core competition goals in the competition law is not optimal.⁴¹

Conduct provisions. To be consistent with established international norms, Cambodian competition law should provide distinct, workable definitions of the three main categories of antitrust offense: (a) single firm abuses of market power; (b) agreements between competitors to control price, reduce output, divide markets, exclude or restrict competitors, or otherwise collusively limit the competitive operations of the market; and c) anticompetitive mergers, acquisitions, joint ventures, and other combinations of enterprises or their assets.

The proposals for the Cambodian competition law suggest that all three of these categories will be addressed, but the way they are treated may need to be reconsidered.⁴² While precise comments should be postponed until a complete draft has been prepared, one feature of

38 Law on Investment in Cambodia, August 4, 1994, and Amendment of the Investment Law, March 24, 2003.

39 Declaration of Government on Privatization of Public Enterprises, December 20, 1994; Ankurel on Privatization of Public Enterprise, April 19, 1995; Law on the General Status of Public Enterprise, June 17, 1996; and Ankurel on Application of the Law on General Status of Public Enterprise, August 6, 1997.

40 Electricity Law of the Kingdom of Cambodia, February 2, 2001.

41 However, this does not suggest that such non-core competition objectives are inappropriate in-and-of themselves. Rather, the examination of such objectives should be separated from the competition review to increase the transparent assessment of these goals and to limit the negative consequences on any competition review.

42 The following paragraphs rely on the “Detailed Points of Policy” in Sumner (2005), op. cit., at 44 et seq.

particular concern that appeared both in reports and interviews was an apparent reliance on some minimum market share before horizontal and vertical agreements might be considered anticompetitive, or notification and review of mergers and acquisitions would be required. The intent of the market share test appears to be to limit application of the law to agreements that injure competition, which is sound. A market share test, however, may fail to reach some agreements that should be of serious concern, particularly the most egregious forms of anticompetitive agreements, including price-fixing, bid rigging, and allocation of territories or customers.⁴³ For these particular types of violations, the government should consider dropping a market share test. Proof of market share requires defining a relevant market. Experience has shown that this can be a difficult and time-consuming process. A cartel to fix prices between two breweries, for example, would raise questions as to whether only domestic beers are in the market, whether foreign beers might come into the market in response to an anticompetitive price rise, whether liquor, wine, soft drinks, or tea are also in the relevant product market, and so forth. When such questions are raised, it may be difficult to legally prove that an obviously anticompetitive agreement meets the market share test. In the case of a price-fixing agreement, such an inquiry may not be worth the effort.⁴⁴ It is important to note that market share thresholds – or “safe harbors” based on market shares – are, however, appropriate with respect to abuse of dominance/monopolization matters.

As discussed in the recommendations section, the government would benefit from a careful drafting of the law. Consideration should be given to international best practices, and input sought from a variety of national and international experts, taking into account the particular characteristics and needs of the Cambodian economy and politics.

C. Implementing Institutions

The **Ministry of Commerce** established a **Working Group on Competition**, which consists of seven members: one from the Council of Ministers, two from the Ministry of Commerce, one from the Ministry of Justice, one from the National Bank of Cambodia, one from the Ministry of Economy and Finance, and a professor from the Royal University. One suggestion was to make these seven members into a commission within the Ministry of Commerce. The diversity of commissioners is presumably to guarantee representation of various constituencies. While this goal is laudable, there is a danger that commissioners appointed to represent a specific constituency will have a parochial interest. Therefore, the number and type of such seats on the commission set aside for diverse groups could be limited. If, on the other hand, the government creates a commission in which all or even the majority of commissioners are representatives of different ministries, then it will be very cumbersome and may be overly politicized.

43 A de minimis exception for very small market shares, say 2 percent, is not unusual to find. If, however, Cambodia were to follow the model of Vietnam in exempting parties to an agreement with combined market shares up to 40 percent, it would be a very serious weakness in the law.

44 Similarly, recommendations have been made that all concentrations are required to be notified unless the combined market share of the merged entity is under 50 percent. The market share exception will present the same difficulties cited above. An objective threshold such as sales or assets in Cambodia may prove preferable. In designing the merger provisions, review of the International Competition Network (ICN)’s Recommended Practices for Merger Notification and Review Procedures is important. The ICN is a voluntary organization of virtually all of the world’s competition agencies, and has unanimously adopted a series of Recommended Practices for merger notification and procedures, representing a consensus of best practices. The Practices are available at: <http://www.internationalcompetitionnetwork.org/guidingprinciples.html>.

Commissions composed of legal or economic competition experts with a general mandate have worked well in other jurisdictions.

It is generally agreed that competition agencies should be “independent” – their actions should be based on the facts and the law, and not on political considerations, and that they should not discriminate in favor of incumbent firms or favor local firms over foreign ones. While there is general agreement that independence is important, there is far less agreement as to how that should be accomplished as an organizational matter. A number of jurisdictions within the Ministry of Commerce have some competition authority. The success of this model appears directly related to the degree of independence the agency has from political influence. If the ministry is too involved in the work of the competition agency, the agency may make economically sensible decisions that are trumped by the Ministry, which might prefer decisions that are more popular in the short run. One solution may be to have an agency that is administratively part of a ministry, but is substantively independent. On the other hand, an agency that is wholly insulated from any connection to the rest of the government may not be properly funded, have its views on competition issues respected by other state agencies, or be appropriately accountable. Institutional decisions relating to independence should be made with a country’s particular political and legal culture in mind.

Another suggestion for the implementing institution is one modeled after the Electricity Authority of Cambodia (EAC).⁴⁵ The EAC is led by a three-member board, appointed by the Council of Ministers in staggered terms for a maximum of six years. Only the courts can remove individual board members. Decision-making is by quorum, and done in consultation with the Ministry of Industry, Mines and Energy (MIME). EAC has strong investigatory and decision-making powers, and has already revoked a license for a licensee’s failure to perform. EAC engages in advocacy and outreach activities, offering non-binding opinions to the public and private sector as necessary, and holding an annual workshop for all licensees. Consideration might be given to replicating this structure for the competition agency.⁴⁶

Regardless of the particular model, the **competition agency** will need legal and bureaucratic processes for gathering evidence, procedures for challenging activity that the investigation reveals to be anticompetitive, and procedures to enforce any measures that may be ordered as a result. To ensure fairness and promote public confidence, all of these processes should be immunized, to the extent possible, from improper outside influence. The competition agency should also contribute to an enforcement process that is conducted expertly, expeditiously, and independently. The competition agency should have, for example, an enforceable legal process in place for acquiring the information it needs to conduct its investigations, with appropriate sentences for non-cooperation or non-compliance. Similarly, fines collected for violations should not be paid to agency employees or directors, or to the agency itself, but rather into the national treasury, in order to avoid creating incentives that might give the appearance of distorting the independent application of the law. Finally, a crucial role for the Cambodian competition authority will be to entrust it with the power to advise or advocate with other government institutions in favor of economic measures that benefit competition.

45 See Electricity Law of the Kingdom of Cambodia, February 2, 2001, Articles 6-19, et seq. Articles 57-77.

46 One exception would be that the Board is comprised of part-time commissioners, and full-time commissioners may be preferable.

D. Supporting Institutions

Judiciary. The courts would be the likely enforcement authority for the competition agency's decisions. According to Article 123 of the Constitution, the judiciary is responsible for administrative matters. While the 1995 Law on Commercial Regulations and the Commercial Register provided for the creation of a commercial court to hear trade-related disputes, as of February 2006 that court had not been created. The existing judicial system is weak, according to the World Bank's Investment Guide to Cambodia: "[C]ambodian judges are inexperienced and the courts understaffed. There are frequent problems with inconsistent judicial rulings as well as outright corruption."⁴⁷ Although the government is taking steps to address some of these issues, enforcement in the courts is likely to be a challenge until significant progress is made.

Private sector. In its "Rectangular Strategy," the government states that it "considers the private sector to be the engine of economic growth... [and that] a healthy private sector is the key to the promotion of economic development." The Rectangular Strategy demonstrates the government's recognition for the need to institute a number of economic and judicial reforms to improve the business climate.⁴⁸ Similarly, the International Chamber of Commerce (ICC)'s Investment Guide to Cambodia states that "[t]he private sector in Cambodia enjoys a healthy dialogue with the government about policy through such organizations as the Bankers Association, the Garment Manufacturer's Association, the International Business Club and the Phnom Penh Chamber of Commerce."⁴⁹

However, interviews suggest that the government's commitment to business environment reform may remain largely a governmental process, without significant input from local stakeholders in the business community. Specifically concerning the competition law, the government asserts that two seminars have already been held to allow private-sector feedback on the competition law. But there is concern that the results of a May 2005 roundtable between government, donors, and the private sector on the competition assessments have not been appropriately incorporated, and that the speed with which the law will be drafted and passed will prohibit significant consultations with the local business community. This is in stark contrast to commonly-accepted best practices when drafting a competition law.

Furthermore, there appears to be a widespread lack of understanding of the mechanics of competition law and policy among much of the business community. Many view the introduction of a competition law as a means of promoting so-called "fair competition," understood as the protection of business from anti- and pro-competitive activities of competitors.

The private sector actors that do have a sound understanding of competition law and policy are divided into two groups: those that are among the foremost supporters of the adoption of a competition law and who view competition law as a necessary element of market reform and a

47 The United Nations and the International Chamber of Commerce, Cambodia: An Investment Guide to Cambodia, Opportunities and Conditions ("Investment Guide"), October 2004, at 45.

48 Rectangular Strategy for growth, employment, equity and efficiency of the Royal Government of Cambodia, delivered by Samdech Hun Sen, the Prime Minister, in the first cabinet meeting of the third legislature of the National Assembly, July 16, 2004, cited in "Business Issues Bulletin", No. 7, 2005.

49 Investment Guide, *supra* note 47, at 30.

key component of attracting investment; and those that fear over-enforcement of the law and the unilateral intervention of the competition agency in markets, in the context of broader tendencies and temptations for the state to intervene in market processes.

A notable success in promoting public and private dialogue, and one that should be utilized for discussing the draft competition law, is the **Private Sector Forum** organized by the International Finance Corporation.⁵⁰

Law faculties. While there are currently no courses offered in competition law in Cambodia, the university system appears to have competency in commercial law generally. The Royal University of Cambodia has five professors who specialize in commercial law, with at least one who is knowledgeable about competition law. There is also a Masters of Private Law program in a private university in Phnom Penh, with approximately 30 graduates per year (typically mid-level civil servants). All of the professors in this program hold international law degrees. As described in the recommendations section of this chapter, competition law classes should be offered at the university level.

E. Social Dynamics

Openness to trade and foreign investment has been a cornerstone of economic policy in Cambodia since 1993, and the vast majority of state-owned enterprises (SOEs) have been wholly or partially privatized. Despite these efforts, however, Cambodia performs poorly on global competitiveness indicators. In the World Economic Forum's Growth Competitiveness Index Rankings, Cambodia ranked 112th out of 117 countries surveyed. Cambodia fares similarly in the World Economic Forum's Business Competitive Index Rankings, 109th out of 116.⁵¹ By way of comparison, Vietnam is ranked 81st and 80th, respectively. Overall, considerable efforts on the part of the government are needed to improve the competitive environment so that Cambodia can maximize the benefits of Association of Southeast Asian Nations (ASEAN) and ASEAN Free Trade Area (AFTA), and a market economy more generally.

Regarding competition law specifically, the interest in adopting a competition law stems from the important market reforms undertaken over the past decade, including reduction of trade barriers, privatization of the telecommunications industry and most of the electricity sector, and tax reform. However, it is difficult to judge the extent of private anticompetitive behavior that could be governed by a functioning competition law and agency. One source of data on anticompetitive behavior is the World Bank's Productivity and Investment Climate Survey ("Survey").⁵² The Survey reports, *inter alia*, on companies' views about the extent to which their economic success has been affected by private and public anticompetitive practices. Two survey indicators that are of particular relevance include: (i) questions related to anticompetitive practices private firms carry out against competitors; and (ii) preferential government

50 Past successes of the Forum include resolution of a debate surrounding scanning of imports and exports at the ports, and an agreement on controversial land concessions.

51 The World Economic Forum's Competitiveness rankings are available at: <http://www.weforum.org/site/homepublic.nsf/Content/Global+Competitiveness+Programme%5CGlobal+Competitiveness+Report>.

52 World Bank, *Seizing the Global Opportunity: Investment Climate and Reform Strategy* (2004) at 9 et seq. Cited in Sumner (2005) at 15-16.

relationships only some firms enjoy. Regarding the first indicator, 34 percent of respondent firms said that the practices were a “major” or “very severe” obstacle to conducting business. Similarly, 32 percent of firms surveyed reported that preferential government relationships were a “major” or “very severe” obstacle to conducting business.

The 2005 Consumer Unity and Trust Society (CUTS) study “Country Report on the Competition Scenario in Cambodia” attempted to highlight specific examples of private and public anticompetitive practices that could be remedied through proper enforcement of a competition law. The study examined, *inter alia*, four industries – electricity, telecommunications, forestry, and banking. In all four industries there were concerns about policies that restrict firms’ ability to compete and possible restrictive behavior on the part of the firms themselves. However, the crosscutting themes of the entire report focused on state-imposed restraints.⁵³

Conclusion. Effective competition law and enforcement, together with several microeconomic, industrial, and commercial policies such as privatization, international trade, and foreign investment, are among the main instruments for nurturing market reform. The application and interface between an effective competition law and these related policies can have a significant bearing on industrial structure and the competitive market performance of enterprises in both the private and public sector, as well as on economic development generally.

The implementation of an effective competition law in Cambodia is likely to face a number of obstacles. Principal among these obstacles are building political support for a law that is intended, at least in part, to discipline government, and educating the public regarding the benefits of competition. More detailed recommendations for reform follow in the next section.

F. Recommendations

- Continue to prepare and complete draft competition law.
- Further disseminate the draft law for comments.
 - Utilize the existing Private Sector Forum to discuss the draft competition law.
 - Request comments on the draft law from a variety of international experts.
- Prepare an advocacy brochure for the National Assembly members, explaining in clear, basic language the principle purposes of a competition law in Cambodia, drawing on examples from existing studies (e.g., EU Multirap reports, CUTS studies)
- Provide technical assistance to make the law operational, including assistance in: (a) planning and setting priorities of the new agency; (b) assistance in drafting any required implementing regulations; (c) developing internal agency operating procedures for handling complaints, investigations, and exemptions; and (d) training agency staff in case screening and investigative techniques.
- Develop university classes and regional training programs.

53 One specific example cited was in the Preah Vihear province, where the governor issued a regulation authorizing only one person to conduct the sale of eggs. Any activity of selling eggs by other persons in that province is unlawful. CUTS Country Report, *supra* note 44, at 24.

- Continue advocacy initiatives, including reviews of policies and regulations affecting competition, and preparing studies on key sectors.
- Promote a competition culture through public communication including: preparing communication/media materials; enhancing the capacity of media in publication of competition-related issues through dialogue/workshop with journalists; and engaging in dialogue/workshops with related law enforcement officers, other state regulators, and the business and academic communities.

VIII. Commercial Dispute Resolution

A. Introduction

At this time, commercial disputes in Cambodia are generally resolved through self-help measures. The courts are perceived by private sector and non-government organization (NGO) representatives as uniformly unreliable, plagued by corruption, and lacking in commercial sophistication and political independence. In 2006, Cambodia enacted a Commercial Arbitration Law that presented an attractive alternative to the court system. However, some concerns remain over the independence of the commercial arbitration board created by the law.

One positive development in Cambodia's commercial dispute resolution landscape is the Labor Arbitration Council, which since 2004 has had the authority to resolve collective labor disputes. The Arbitration Council has gained the respect of both labor and employers, and has reduced the number of unauthorized strikes and a significant decreased the time it takes to resolve a labor dispute. The success of the Labor Arbitration Council makes it a promising regional model, although donors assert that they would like to see the Council become self-sustaining.

B. Legal Framework

Cambodia's legal framework affecting commercial matters is fragmented. There have been significant improvements in the quality and availability of certain laws as a result of Cambodia's successful bid to join the World Trade Organization (WTO). In December 2004, the seventh meeting of the Cambodian Development Coordination Forum (CDCF) of donors identified eight key laws that did not yet exist in modern form: (1) a penal (criminal) code; (2) a code of penal (criminal) procedure; (3) a civil code; (4) a code of civil procedure; (5) a law on the organization and functioning of the courts; (6) a law that would ensure transparency in the appointment, promotion, and remuneration of judges and prosecutors, as well as the independence of judges and prosecutors; (7) a revised Law on the Organization and Functioning of the Supreme Council of Magistracy; and (8) an anti-corruption law.⁵⁴ At the CDCF's eighth meeting on March 2-3, 2006, it was noted that, notwithstanding some progress, none of these laws had been enacted.⁵⁵ But by November 2007, laws on penal and civil procedure had been enacted, and the civil code had been passed by the National Assembly and was expected to receive final enactment soon. However, five recommended laws remain outstanding.

In addition to laws passed by the Parliament and promulgated by the King, a system of decrees, sub-decrees, and ministerial circulars defines the commercial legal landscape. It is often difficult to access the relevant laws affecting a transaction and find the applicable regulations and sub-decrees. This leads to inconsistency in legal judgments that makes the commercial legal environment highly unpredictable.

54 Cambodian Development Coordination Forum Meeting on Cambodia (December 6-7, 2004), 2004 Priority Monitoring Indicators, at 2.

55 Cambodian Development Coordination Forum Meeting on Cambodia (March 2-3, 2006), Opening Remarks of Co-Chair Ian C. Porter.

The recent enactment of the civil procedure code and criminal procedure code will help build better consistency and confidence in the courts, as will the imminent enactment of the civil code. There needs to be legal clarification, however, particularly in the areas of notaries, enforcement of judgments, and the role of judges and courts.

Civil and commercial cases. Cambodian regular courts hear five types of cases: administrative, civil, commercial, criminal, and labor. As of November 2007, there is no specialized commercial court or chamber, so in practice any judge within any court may hear any of these types of cases. This has the effect of diluting an already thin pool of expertise within the courts, and judges do not gain specific expertise by practicing within one specific issue area. A draft law on commercial courts may change this state of affairs.

In general, there are five phases of conducting a civil or commercial suit:

1. **Lodging a complaint.** Civil litigants are entitled to lodge complaints directly with any court of first instance. A clerk will check to make sure the subject falls within the court's jurisdiction and will log the complaint and its subject matter and present it for acceptance by the President of the court. The President may then accept the case for resolution, assign it to a judge, or reject the complaint as invalid. The court will accept both oral and written complaints.
2. **Reconciliation.** Once a case is accepted, the judge or presiding officer will issue a summons and convene the parties to conduct a reconciliation, which requires the voluntary assent of both parties. Most courts consider this step to be mandatory, but it is not well settled in the law. If the parties agree on a settlement, the judge may issue a binding order memorializing the mediated agreement.
3. **Complaint registration.** If the parties cannot agree on a reconciliation, a case will proceed to trial. Plaintiffs are required to pay a nominal court fee for a case to be registered, as well as additional proportional fees and taxes based on the court and size of the case, in accordance with the **Law on Court Fees (1993)**. Litigants may also have to pay fees for court investigation and service of process. Ultimately all fees are borne by the losing party.
4. **Investigation.** After a case has been registered and fees paid, the court appoints an investigating judge to seek the facts of the case within the parameters of the complaint. The investigating judge will convene the parties to confirm their identity, conduct interviews, collect and review documents, and compile all relevant information into a case dossier for use in the trial. Investigating judges may also achieve a reconciliation between parties during this process.
5. **Trial.** Civil cases are heard by one judge, to whom the parties have an opportunity to object if they believe he or she is not impartial. Trials are generally held in public, and involve an appearance and presentation from each of the parties. The judge plays a dominant role in questioning the parties and any witnesses to determine the facts of a case. The parties may also challenge each other and the facts. The judge renders decisions

after all parties are heard. Judgments may be issued as either self-executing or not depending on whether the losing party appeals.

Appeals to any civil judgment may be made to the Court of Appeals on the basis of errors in fact and law. This has the effect of prolonging execution of many civil judgments. There is only one appeals court, and the delays can last up to several years before an appeals hearing. A second appeal may be made to the Supreme Court from the Court of Appeals on matters of law. In practice, complex or otherwise significant cases will appear before the Supreme Court, which further delays final resolution.

One unique deficiency in the legal framework is a provision in the existing criminal code that includes the crime of “breach of trust.” The courts have interpreted this provision to include some forms of breach of contract, such that a commercial party in a breach of contract dispute may find himself charged with a criminal offense. The use of this charge tends to be based more on politics than law, but has occurred enough to be a damper on investment.

Judgment execution. In February 2006, **Decree 51 on Enforcement of Civil Judgments** and the **Law on Execution of Judgments (1992)** provided for court enforcement of civil and criminal judgments. According to these laws, the court may order three types of remedy: (i) an order to pay compensation or settlement; (ii) an attachment of a debtor’s property; or (iii) imprisonment for a debt. Executions of judgments are effected by the judgment executor, who is a court clerk. Execution proceeds generally as follows:

- The order to pay is attached to all final judgments, and it is incumbent on the losing party to satisfy the judgment within a specified period of time.
- An attachment may be made by court order at the request of a creditor either at the same time as the declaration of the judgment, or by request after a debtor has failed to pay. It is the responsibility of the judgment executor to effect an attachment upon receipt of a proper court order. Any property seized by the court in satisfaction of a judgment will be auctioned unless the judgment calls for specific performance.
- Imprisonment is a last resort taken to persuade recalcitrant debtors to pay what is owed. The imprisonment does not satisfy the debt, but is akin to punishment for contempt of court. It is unclear how often this provision is used.

Stakeholders demonstrate mixed reactions to the effectiveness of judgment enforcement. One lawyer described the system as effective, once a party had gone through the lengthy process of appeals. Other stakeholders complained that final execution was nearly impossible. Like many elements of the Cambodian legal system, the ultimate answer may depend more on politics and personal influence than on law. Under the right conditions, with the right people involved, the system can work effectively. The problem is that parties cannot anticipate with any certainty the outcome of a case; also, the course of a case is subject to change by one call or decree from a powerful government official.

According to the Ministry of Justice, as of November 2007, the Law on Execution of Judgments had been abrogated by the **civil procedure code**, which was to take effect in mid-2007. The Japanese government was contributing to training of judges in the new code through the Royal Academy for Judges and Prosecutors.

Cambodia is also a signatory to the New York Convention on Enforcement of Foreign Arbitral Awards, but no lawyer or judge the diagnostic team consulted was aware of any case in which a court had enforced a foreign arbitral award.

Labor Law and Decree on Labor Arbitration. Another significant category of commercial disputes relates to organized labor. In particular, the garment industry comprises a significant portion of Cambodia's export market, is highly unionized, and employs 250,000 domestic workers. The tourism and hotel industry is another key component of the Cambodian economy that faces unions bringing collective labor disputes.

To address collective labor disputes, the **Labor Law (1997)** created the Labor Arbitration Council (the "Council"), which has a mandate to hear all collective labor disputes. The Council is further governed by Prakas (Sub-Decree) #99 of MOSALVY (2004). The Council's awards are non-binding, unless the parties agree otherwise. The Council may hear two types of disputes: rights disputes, which are disputes over the terms of existing legal and contractual agreements, and interest disputes, referring to unresolved issues of future relations and benefits. Parties may only be employers on one side and groups of employees on the other. The law does not clearly define how big a "group" must be to have standing, but the group must present an issue common to many workers in the same position, and typically this is accomplished through a union.

The procedures for bringing a matter before the Council encourage reconciliation. Collective labor disputes are presented first to a Labor Inspector within the Ministry of Labor to attempt a settlement. The conciliator must take up the case within 48 hours of receiving the complaint and resolve the matter within 15 days, unless both parties agree to extend the period. If the case cannot be resolved, the Minister of Labor will refer it to the Arbitration Council within five days. The Labor Law prohibits strikes or lockouts while a case is being arbitrated and the Arbitration Council also has the authority to issue "back to work" orders.

Disputes referred to the Labor Arbitration Council are heard by three member panels, with one arbitrator chosen by each side from separate lists of eligible arbitrators, and the third chosen from a government list by the initial two arbitrators. Arbitrators will first discuss the issue with parties and attempt a negotiated resolution. Failing that, the parties will be given the choice of whether they want the arbitration to be binding or non-binding. The Arbitration Council must hold at least one hearing among the parties and must reach a decision within 15 days of referral from the Minister of Labor, unless both parties grant extra time. Written, reasoned decisions are issued for each case. If the case is non-binding, either party may reject the award within eight days of its issuance. Failing rejection, the decision becomes binding.

If the parties agreed to binding arbitration, or if an award is not rejected in a timely fashion, then it is legally enforceable in the same manner of final court judgments. The Labor Inspectorate of the Ministry of Labor also assists in its enforcement. According to the Arbitration Council Foundation, few decisions have been tested by court enforcement.

Law on Commercial Arbitration. The National Assembly enacted the Law on Commercial Arbitration in March 2006. It generally follows the United Nations Commission on International

Trade Law (UNCITRAL) model, but with one significant exception, discussed later. Under the law, parties are free to enter arbitration agreements and may initiate arbitration at any time by serving a demand on the opposing party. Arbitration parties are allowed broad choice of law, venue, and procedures for arbitration. Unless the parties agree otherwise, arbitration awards are binding and enforceable as if they were court judgments.

The commercial arbitration law also includes one provision that has been the subject of considerable concern and controversy. Chapter III of the law creates a National Center of Commercial Arbitration, which is run under the auspices of the Ministry of Commerce and has exclusive authority to certify the pool of commercial arbitrators. This approach represents a significant divergence from the international standard of freedom of parties to choose their arbitrators. Private sector representatives worry that Ministry of Commerce oversight of the National Center may lead to political interference in the pool of arbitrators that parties may select from, and thus undermine the integrity and independence of the arbitration process. As of November 2007, the Ministry of Commerce was well aware of these concerns and stated unequivocally that the National Center, for which a building had been found, would be independent. Outside observers confirmed that a pending sub-decree may “correct the mistake of the law” and were carefully watching for official confirmation of this much-needed independence.

C. Implementing Institutions

Cambodia has a three-tiered legal system composed of courts of first instance in each province and municipality, an Appeals Court, and a Supreme Court. There is currently no commercial or criminal specialization in the courts, and cases tend to be assigned by the President of the court on an ad-hoc basis, although plans are underway for the introduction of commercial courts. Appeals to the Appeals Court may be made on the basis of law or fact, which gives that body effective *de novo* review of any case. Appeals to the Supreme Court may only be on matters of law, but the Supreme Court may hear issues of fact if a case comes to it again after remand to the Appeals Court. The practical effect of this system is that any decision by an initial court may be heard three times, which, given a significant backlog at the Appeals and Supreme Courts, can take several years.

The chief implementing institution with respect to Commercial Dispute Resolution is self help, followed by foreign arbitration, and then the court system. At this time, there are approximately 150 Cambodian judges who the Supreme Council of the Magistracy has appointed. More judges are expected to be appointed as students pass through the Royal School of Judges and Prosecutors, which trains a 50-member class every two years. The creation of the school of judges three years ago was a significant positive step in improving the capacity and integrity of the bench. The judicial training school curriculum includes specific training on a range of commercial matters.

The **Labor Arbitration Council**, along with its supporting Arbitration Council Foundation, is perhaps the most successful commercial dispute resolution body in Cambodia, and offers an inspiring best practice for the region. The Arbitration Council was created by the Labor Law, and has jurisdiction to resolve collective labor disputes. The International Labor Organization,

supported by USAID, played a critical role in establishing and nurturing the Arbitration Council, which is now an independent institution.

Arbitral panels consist of three arbitrators chosen from three lists of 10 arbitrators each. The employee party selects an arbitrator from the labor list; the employer selects an arbitrator from their list; and the two chosen arbitrators select a third from a neutral list. Once chosen, arbitrators are to act independently with respect to their designated list, and decide cases by at least a two-thirds majority. Decisions of the Arbitration Council are non-binding, and either party may dispute them for any reason within eight days of the issuance of the award. In that case the matter will be referred to a court for adjudication. Parties may contract either in a labor agreement or in writing before the commencement of an arbitration that the decisions will be binding, which would be enforceable in court. To date, none of these binding arrangements have been challenged.

The Arbitration Council has heard more than 230 cases in its first two years of operation, of which 70 percent have been resolved successfully – meaning that the parties have accepted the decision. Eighty percent of cases pertain to the garment sector, with hospitality/tourism representing the next largest set of cases. The Council's unusual success can be attributed to several factors:

- The pool of arbitrators was chosen in a politically neutral fashion with the assistance of international donors, and arbitrators are of high experience, education, and integrity.
- The tripartite selection process from the three panels increases confidence of the parties and eliminates bias among the arbitrators toward one party.
- Reasoned decisions are promptly published and disseminated, and serve as precedent for future decisions.
- The process is perceived as open and transparent.
- The fact that decisions are non-binding eliminates the incentive for corruption, because if one party is believed to have bribed a panel, the other party can simply reject the decision and the other party's money would be wasted.
- Both sides of a labor dispute have a strong incentive to resolve the matter quickly – a lengthy court battle in the midst of a strike costs the workers salary and the employers productivity.

Based on these successes, a few lessons can be drawn for application to a commercial arbitration or commercial court process. First, it is vital to get the most qualified people to be arbitrators. Second, it is critical to maintain transparency and predictability by publishing all decisions in an organized fashion. On the other hand, the Council benefits from the fact that both parties lose if a labor dispute remains unresolved, and therefore the parties appearing before it are highly motivated to settle. This not true of many standard commercial disputes.

Many additional groups can be considered as implementing institutions in their capacity as drafters of laws, ordinances, decrees and regulations. These include the National Assembly, the Office of the Prime Minister, the Ministry of Justice, and the line ministries, including the Ministry of Commerce, the Ministry of Interior, and the Ministry of Labor.

D. Supporting Institutions

The Bar Association of Cambodia is the official licensing organization in Cambodia, and membership is required to practice law. The Bar Association is a non-profit, self-financing organization (Article 13). The law recognizes the legal profession as an independent and autonomous profession in the service of justice (Article 1). The practice of law in Cambodia is generally restricted to Cambodian nationals who have received a Bachelor of Law degree or the equivalent, have passed a bar examination, and have completed a year-long apprenticeship supervised by practicing lawyers. New applicants to the Bar must first have their legal credentials recognized by the **Bar Council**⁵⁶ and be selected to take a qualifications exam. Those who pass are issued a Certificate of Aptitude in the Legal Profession and are admitted to the **Legal Training Center** to complete their training requirements.⁵⁷ Only after satisfactory completion of the training does the Bar Council register a lawyer on the Bar List, entitling them to practice law. The Bar Association decides in advance how many lawyers will be recruited each year.

Legal education in Cambodia is provided by a handful of public and private institutions offering both undergraduate and masters degrees in law. Most schools in Cambodia are not internationally accredited, and the quality of the legal education is mixed. A general legal curriculum will include basic commercial legal subjects, such as contracts and business formation. But there is little access to education regarding more sophisticated commercial legal concepts. That said, many government officials with expertise in certain commercial law areas regularly teach at the law faculties.

Law schools are also under-resourced, and it is often difficult to obtain or provide sufficient teaching materials to students. The education system is also plagued by corruption, which undermines the integrity of a legal degree. It is not uncommon to hear stories of people who rarely attend class earning a law degree based on a payment at the end of the term. Access to the bar association is restricted, and most law graduates find employment in ministries or the private sector.

The **Royal Academy of Judges and Prosecutors** has operated since about 2003 and provides advanced training to successful applicants who wish to be judges or prosecutors. As of November 2007, the academy was considered to be a strong organization, operating a curriculum that offers judges comprehensive training in all areas of judicial skills, including trial procedure and ethics, and substantive training in criminal, civil, and commercial law. Candidates must pass a competitive examination to be admitted to each class. The school is supported by the Japanese, French and U.S. aid agencies and has significantly improved judicial training and capacity. The school was recently expanded to include training of court clerks, a vital link in the provision of effective legal services.

The **Lawyers Training Center** is an institution run by the Bar Council under the authority of the Ministry of Justice that provides training to successful applicants to the Bar Association and is a

⁵⁶ The Bar Council has 19 members elected for three year terms.

⁵⁷ Internal Regulations of the Bar Association of the Kingdom of Cambodia, Article 9. Text available at http://www.bigpond.com.kh/Council_of_Jurists/Judicial/jud008g.htm.

pre-requisite for being admitted to the Bar. The year-long curriculum includes training in general legal theory as well as civil and criminal law. Civil law topics include business law, intellectual property, e-commerce, taxation law, accountancy law, labor law, international commercial law, and negotiation, conciliation, arbitration, and intellectual property. Well-qualified Cambodian and international lawyers, judges, prosecutors, and academics provide instruction. Thus, an admitted lawyer has a broad but shallow acquaintance with the main commercial topics before he or she begins practicing law. The Lawyers Training Center receives support from the Canadian, Japanese, and American Bar Associations.

Cambodia also has a thriving **non-government organization (NGO) sector**, which is active (if not entirely effective) in a number of areas relating to commercial dispute resolution. The Cambodian Defenders Project and Legal Aid of Cambodia represent indigent parties in court and also lobby for legislative and judicial reforms. The Center for Social Development has focused on anti-corruption. Also, industry and trade groups like the Garment Manufacturers Association are active in advocating common interests. The courts and government typically do not seek input from these organizations, however, so the NGOs have acted more as a watchdog than an engine of reform.

There is an active **media** in Cambodia, which varies in quality and independence depending on type. The print media is the most free, and includes numerous Cambodian dailies, plus an English-language daily and weekly that are widely read by educated Cambodians in Phnom Penh. The print media tends to follow political party lines, but often reports on commercial matters, and also covers controversial issues like state concessions and corruption. The provincial literacy rate in Cambodia is less than 50 percent, so there is limited penetration of this information beyond the cities. Radio is the farthest reaching media in Cambodia, but has fewer outlets than print and faces more pressure and restrictions when it comes to politically controversial subjects. There are a few NGO- and opposition party-affiliated radio stations that are more likely and able to provide frank coverage of economic and political affairs. Television has potentially the greatest impact of all media, and is consequently much more tightly controlled by the ruling party. On the whole, Cambodians have relatively good and free access to information about news affecting business. However, this does not necessarily translate into an expectation or demand for reform.

The **Council on Legal and Judicial Reform (CLJR)** is the principal state entity responsible for implementing legal reforms, although, other than through its effective administration of a Working Group that tracks legislative updates, it is considered relatively weak. The CLJR has produced a lengthy and detailed multi-year reform agenda that calls for reform of the governing legal institutions, passage of significant new legislation, administrative reform, and reduction of judicial corruption. The CLJR reform plan is an admirable model document.

The **donor community** provides critical support for the legal sector and drives most reform efforts. Donor involvement takes place at the state, regional, and grass-roots levels. The donor community also supports a vibrant domestic NGO community that is active in legal and commercial reform. A multitude of bilateral and multilateral agencies are actively involved in legal and judicial reform, legal drafting, implementation of law, and skills training. Prominent participants include the United Nations Development Program (UNDP), the World Bank, Asian

Development Bank, the International Monetary Fund, and European Union, plus bilateral agencies such as Japan International Cooperations Agency (JICA), French Cooperation, AusAid, the Danish Institute for Human Rights, and USAID.

Donor influence is amplified by the Cambodian Development Coordination Forum (CDCF), which includes all significant Western bilateral and multilateral donors to Cambodia and meets periodically to decide how to provide aid collectively valuing over \$500 million dollars per year. The CDCF establishes benchmark conditions upon which it evaluates the amount and direction of their aid. Recently, key items on the Legal and Judicial Reform Agenda have been included as benchmarks and are a primary focus of diplomatic pressure and economic aid.

E. Social Dynamics

Cambodia's commercial environment lacks rules and enforcement of the few rules it does have. According to private sector, NGO and donor representatives, corruption influences every commercial deal. Against this background, there is a strong desire for change among ordinary citizens and the business community alike. However, there is an equally strong perception that there is little that domestic stakeholders can do. Many of the problems with the legal system are seen as endemic and entrenched. Likewise there is a risk that well-connected players in the system are immune from consequences.

The weak commercial dispute resolution system in Cambodia significantly increases costs for business and eliminates the prospect for international investment in all but a few sectors, such as the garment industry. Corruption further impedes the development of small and medium enterprises.

F. Recommendations

- Continue support for the Legal Training Center and Royal Academy of Judges and Prosecutors.
- Provide financial support and training for an independent Commercial Arbitration Board.
- Provide continued financial and political support for the Labor Arbitration Council.
- Promote a draft Commercial Court Law to provide for a limited number of independent, specialized courts to hear complex commercial cases with a streamlined appeals process.
- Educate judges, court clerks, lawyers, and law students in the details of the new civil, civil procedure, and criminal procedure codes.
- Apply diplomatic and financial incentives to encourage the government to achieve demonstrable progress in implementing the Legal and Judicial Reform Agenda, with priority areas including:
 - Strengthening of the Supreme Council of the Magistracy
 - Passage of primary judicial legislation – Law on the Organization and Functioning of the Judiciary and Law on Anti-Corruption.

IX. Court Administration

A. Introduction

Although the government has some efforts underway to reform various aspects of its judicial system, strengthening Cambodia's courts still requires a significant investment of time, resources, and will. Most courthouses throughout the country, including the only Appeals Court, are in a state of disrepair. Computers are rare and docketing and filing is disorganized and done by hand. Decisions are almost never published. Court clerks are underpaid and lack training in modern court administration techniques. Judges, though relatively well paid, do not have sufficient access to new laws and continuing education on the emerging commercial law framework. Lawyers complain of not being notified of critical court dates and of being denied access to relevant case files. These deficiencies occur against a backdrop of legal informality whereby negotiations between parties, judges, and clerks may have as much or more meaning than case documents. As summarized by one private lawyer, "if you know the law, but not the courts, you don't know much."

Without a functioning court administration system, the courts are unable to preserve a comprehensive case record, provide parties with ready access to case documents, or facilitate an efficient appeals process. The absence of clear case documentation also facilitates corruption, which private sector and non-government organizations (NGO) observers report to be endemic in the courts and in which court clerks reportedly play a prominent role. It is possible for a party to ultimately obtain a decision from the courts that is enforceable. But this generally comes at such a great cost of time, money, and frustration that almost all private sector representatives the diagnostic team consulted said they would seek to use the court system only as a last resort. Significant additional resources and training, along with intensified political commitment to reform, are needed for there to be marked improvement in court administration.

B. Legal Framework

Cambodia's legal system is evolving slowly from the communist-dominated system that existed during the State of Cambodia period in the 1980s. The 1993 Constitution established a democratic state based on a free-market economy. The current legal system is based on the French civil law model but, according to private sector and NGO observers, retains influences from the communist period as well as common law influences introduced by the United Nations Administration and by various donors since the 1991 Paris Peace Accords. As a result of this history, the system is confusing and faces complicated challenges. This combination of legal influences is in turn applied by judges with varying legal backgrounds and levels of education.

Administrative authority over the court system is split between the Supreme Council of the Magistracy (SCM), which is the top authority of the judicial branch, and the Ministry of Justice, which oversees the prosecution service and the court clerks. The SCM has constitutional power to oversee and regulate many aspects of the judiciary, including the appointment and discipline of judges. It is supposed to be an independent organ of the judicial branch of the state. Among its

nine members, however, is the Minister of Justice, a member of the executive branch, and others with strong political ties to the ruling party.⁵⁸

The administration of individual courts is controlled by the President (a judge) of each court. Each Cambodian court is supported by numerous clerks who manage the docketing, scheduling, taking of summary minutes, and filing, as well as assisting judges in conducting investigations and taking statements. None of the Cambodian courts are computerized. Records are kept by hand and filed in numbered dossiers. The integrity of court filing systems, in terms of access and record retention, varies among courts. Lawyers in Phnom Penh frequently cited lack of access to court records and lack of notice of critical hearing dates and deadlines as significant obstacles to their practice.

Clerks are required to keep an accurate record of court proceedings and to preserve the dossiers of all evidence and filing materials. Although court clerks play an important role in executing civil judgments, some observers report that this is not the official policy according to the Ministry of Justice. Several stakeholders mentioned the importance of court clerks in the litigation process as individuals that can have a significant impact on the time it takes to process a case.

The newly enacted Law on Civil Procedure sets the procedures for enforcement of judgments. Officials of the court that issue the judgment also enforce the judgment. The law provides that judgments may be self-executing or may be stayed pending appeal. Once a judgment is final, the parties are obligated to pay. In the event of non-payment, a party will bring a judgment to the court, who will assign a court clerk to act as a judgment executor. The clerk will be responsible for overseeing payment by the debtor party, and may seek the assistance of the judicial police to compel performance.

Until recently, the **Law on Enforcement of Civil Judgments (1992)** provided for the attachment of assets to satisfy judgments. The law also provided for imprisonment of a recalcitrant debtor until he or she pays what is owed. According to the Ministry of Justice, this law has recently been abrogated, possibly by the new civil code. As of November 2007, a law on bailiffs was in draft form.

Cambodia has recently enacted a new **Criminal Procedure Code (2007)** and a new **Civil Procedure Code (2006)**. Judges will receive training on these new laws through the Royal Academy of Judges. A new **civil code**, containing new provision on contract law and many other important components, had been passed by the National Assembly and was awaiting final enactment as of November 2007. Other important organic laws remain in draft, including the **Law on the Organization and Functioning of the Courts**, the **Law on Judges and Prosecutors**, and revisions to the **Law on the Organization and Functioning of the Supreme**

⁵⁸ See ADHOC, Human Rights Situation Report (2003), available at www.bigpond.com.kh/users/adhoc/h_r_situation_2003/judicial_reform.htm. (“SCM reform has been identified for some time as one of the key areas for successful legal and judicial reform. Criticism is largely levied towards the composition of the SCM, with the possibility of political influence evident; and current members not regarded as impartial. This is a major obstacle to attaining an independent body and independence for the courts.”)

Council of Magistracy. These laws have been listed by government officials⁵⁹ and donors⁶⁰ as key benchmarks of reform.

C. Implementing Institutions

The Cambodian **court system** is still in the initial stages of reform following 20 years of decimation and neglect. There is a severe shortage of qualified, experienced lawyers and jurists.⁶¹ As of 2007, there are 280 judges and prosecutors. As of February 2006, of the 117 practicing judges in Cambodia, only one in six held a law degree,⁶² and few had advanced training in commercial law. A 2007 class of 63 judges trained at the former Royal Academy of Judges and Prosecutors should contribute to the reversal of this trend.

At this time, there are no specialized commercial courts, or even commercial chambers, although a draft law on commercial courts is currently being circulated for comment. Currently, each court acts autonomously to interpret the law, and, according to individuals who have practiced in the courts, procedures often vary widely from one district to the next. In practice, most commercial cases of any size will be heard in Phnom Penh or one of a few provincial capitals. According to interviews with practitioners in Phnom Penh in 2006 relatively few commercial cases are heard each year.

Cambodia has a three-tiered court system composed of one court of first instance in each of 21 Provinces and two Municipalities; one Appeals Court servicing appeals for the entire country; and one Supreme Court. The Appeals Court may hear issues of both law and fact, which gives any party an effective re-hearing of any initial case. As stated in Article 163 of the State of Cambodia Law on Criminal Procedure, “The appeal has a devolving effect; that means it submits to the second jurisdiction (appeal court) all points of fact and law that were examined by the inferior jurisdiction.” The Supreme Court is a court of cassation, and may initially only hear appeals of law. But upon remand to the appellate court, the Supreme Court may also reconsider the facts of the case. In practice, according to NGO and donor observers, most matters may be appealed for any reason to the Supreme Court if the issue is politically or economically important. The law places few time limits on when a higher level court may hear an appeal, or rules regarding the order it may schedule appeals. Cases may languish for years, according to observers of the courts, between complete re-hearings of the facts.

The **Civil Department** of the courts of first instance is composed of judges, prosecutors, and court clerks. The clerks are responsible for performing the administrative functions of the court. They serve as secretaries for the judges, file cases, keep records of trial proceedings, take statements during investigations, serve process, and execute civil judgments. All court records

⁵⁹ Address at the Opening of the Conference on the Dissemination of the Civil Procedure Code (August 13, 2007), available at http://www.cnv.org.kh/2007_releases/13aug07_criminal_procedure_code.htm.

⁶⁰ See Cambodian Development Coordination Forum Meeting on Cambodia (December 6-7, 2004), 2004 Priority Monitoring Indicators, at 2; Cambodian Development Coordination Forum Meeting on Cambodia (March 2-3, 2006), Opening Remarks of Co-Chair Ian C. Porter.

⁶¹ “From a legal profession of some 400-600 people prior to 1975, some 10 remained in the country five years later.... [T]ill today it remains largely devoid of legal talent.” World Bank, Cambodia at the Crossroads, Report No. 30636-KH, ¶ 15, at 5 (November 15, 2004).

⁶² Id.

are kept by hand. The Cambodian court process is document-intensive on the one hand, requiring standard form submissions for each step of a proceeding, but highly informal on the other, with negotiations between the court and the parties often resolving cases without the need for formal hearings. Briefs are very rarely submitted to court. After cases are disposed, there is no uniform system of record retention and case documents are extremely difficult to access by all but the immediate parties to a case while the case is ongoing.

Cambodian law also allows for **bailiffs** as judgment enforcers, but they are not uniformly used. Instead, some observers report that clerks may be appointed by a judge to serve as a judgment executor for a particular case. Judgment execution is performed by the individual courts issuing the judgment which may receive support from the judicial police if it is necessary to search premises, seize property, or make an arrest. According to the Ministry of Justice, however, this method of enforcement does not occur.

The **Supreme Council of the Magistracy (SCM)** is the principal judicial organ responsible for the smooth functioning of the judiciary, including regulation and discipline of judges. It comprises nine members, including a representative of the King, the Minister of Justice, two Supreme Court Judges, two Appellate Judges, and three regular Judges. The SCM also has the authority to review “all proposed laws and draft laws regarding the organization and the functioning of the judiciary.”

The SCM is constitutionally independent of the executive branch, but has been observed in the past to “lack competence and independence.”⁶³ The World Bank identified reform of the SCM as the most important priority for judicial reform in its 2004 assessment of Cambodian governance, plainly stating that “the SCM’s current membership ... is affiliated to one or other of the ruling political parties. The government needs to consider instead appointing men and women of outstanding integrity and capability with no party affiliation or potential conflicts of interest.”⁶⁴ Revisions to the law on the functioning of the SCM have been under consideration for years. More recently, the SCM adopted a Code of Ethics that is considered a strong model for independent professional monitoring and development.

The **Ministry of Justice** controls the prosecution service and court clerks. It also is responsible for ensuring uniformity and consistency in the drafting of commercial, civil, administrative, and labor laws. In addition, the Ministry of Justice issues circulars clarifying and interpreting elements of Cambodia’s opaque procedural code to facilitate smoother administration of the courts. Despite these circulars, the administrative practices in individual courts vary greatly depending on the attentiveness of the President of the Court and the initiative of the court personnel. The Ministry of Justice is also responsible for monitoring the execution of judgments, although authority in that area also passes to the Ministry of Interior, which controls the judicial police.

63 Kek Galabru, Rule of Law in Cambodia (NDI seminar, August 2004).

64 World Bank, Cambodia at the Crossroads, at 12.

D. Supporting Institutions

The greatest positive change to the Cambodian court administration system has been the recent establishment of a school to train court clerks, which is connected to the Royal Academy for Judges and Prosecutors. The **School of Court Administration** offers a two-year curriculum focusing on procedural law, investigation, and case management techniques.

The **Council on Legal and Judicial Reform (CLJR)** is an inter-ministerial task force within the Council of Ministers that is responsible for executing the extensive legal and judicial reform agenda. The CLJR is also the primary point of contact for donor coordination with respect to judicial assistance. Among the CLJR's priorities are the passage of laws on the organization and functioning of judges, a revised law on the supreme Council of the Magistracy, and the Code of Civil Procedure. Despite having issued an impressive strategy document, the CLJR has so far not demonstrated results in any of these areas. Donors observe that the CLJR has "very little authority and power" but has proven effective at coordinating a Technical Working Group on reform.

The Cambodian courts are orbited by a vibrant and active network of **NGOs** that seek to supplement, support, and reform the court administration. Several legal aid organizations represent clients in court and play a positive role in reinforcing the need for judges and clerks to observe consistent court procedures. NGOs also provide expert commentary on court administration circulars, and provide training to court administration personnel in applying modern techniques. One particularly useful project has been CourtWatch, which the Center for Social Development administers. CourtWatch has placed personnel in certain courts to record basic statistics such as types of cases filed, procedures used, time for disposition, and the presence or absence of counsel. This data is not kept by the courts, and such statistics are vital for obtaining a better picture of which specific areas are most in need of reform.

The **Cambodian Bar Association** is the only official licensing body of Cambodian lawyers, and membership is required to practice in the Cambodian courts. According to the Ministry of Justice, the breakdown of membership is: 392 practicing lawyers; 95 apprenticed lawyers; 44 lawyer students; 16 non-practicing lawyers; 56 lawyers who asked that their name be suspended; and 19 disbarred lawyers. The Bar Association has severely limited resources. The organization's budget comprises \$120 annual dues from its members and a \$50,000 contribution from the government to support legal aid. The bar association contributes commentary to the SCM, government, and Ministry of Justice on issues relevant to court administration and reform, but it does not appear to be a voice that is well heeded. The bar association did not operate effectively in 2005 and 2006 for an extended period because of a dispute over its presidency. The bar association operates the Lawyers Training Center, which trains prospective members of the bar in legal techniques.

The legal sector has been the focus of significant **donor** attention. The United Nations Development Program (UNDP) has played a coordinating role and maintains an active judicial assistance program that includes training of judges and court personnel, technical assistance with relevant legislation, and translation of laws into English. The Japan International Cooperation Agency (JICA) has also given significant assistance to the Ministry of Justice in the commercial

law sector. JICA has focused on translating and disseminating laws to local stakeholders in the judicial process. It provides training through the Royal Academy.

E. Social Dynamics

Cambodian court administration is governed by a series of laws, regulations, circulars, and practice handed down from several different legal regimes over a period of decades. The system is therefore in need of reform. The court clerk training program at the Royal School of Judges and Prosecutors is a good start, but must be accompanied by sound supporting legislation and a commitment of resources to provide courts with the basic materials, including computers, paper, desks, dossiers, and filing facilities. At the moment, building a relationship with the court and its administrative staff is a far more productive avenue for obtaining process than attempting to master the rules as they are written.

It is not surprising that there is a high demand for legal reform from the private sector and from local NGOs. Despite positive rhetoric from the government, private sector, donor, and NGO representatives perceive a significant lack of political will to tackle the problem. The Legal and Judicial Reform Strategy is an impressive document that carefully documents deficiencies in the legal system and lays out a prioritized strategy for reform. If successfully implemented, the Cambodian court system would represent several regional best practices. In the years since the reform strategy was adopted, there are mixed reports on its progress. According to the Ministry of Justice, “approximately 70% to 80 % of the reform strategy has been successfully achieved.” Three of the eight priority laws have been put before the National Assembly.

The courts are weakened by corruption, instances of which include bribes made to the court, political interference into court decisions, and a history of absolute impunity for powerful participants. The government has made strong statements about combating judicial corruption, and has taken some public steps to punish judges it believes to be corrupt. However, many observers have commented that these moves are designed more to gain specific political advantage among factions of the government than to objectively fight corruption by application of due process. A Law on Anti-Corruption was slated for submission to the legislature by the end of 2005 as a keystone of the legal and judicial reform strategy, but was withdrawn.

In addition, commercial actors are concerned about the length of time it takes to receive a final judgment. The court docketing and scheduling system is opaque and one cannot rely on a swift hearing after a case is filed. The greater problem is that most cases are appealed to the Appeals Court, which has a large case overload and can take years to hear a case.

F. Recommendations

- Concentrate resources on establishing a coordinated, donor-funded legal database of laws, codes, and court decisions that is published and readily available to all stakeholders in the legal system.
- Expand the NGO-administered Court Watch program to include monitoring and evaluation of civil/commercial as well as criminal disputes.

- Enhance support and capacity of the school of court administration for improving training of court clerks and staff.
- Upgrade court infrastructure, including refurbishing court buildings in the provinces and introducing computerized case management systems.
- Concentrate on developing judicial training modules that increase capacity to understand more complex commercial disputes.
- Promote passage of codes of conduct for judges, prosecutors, and clerks, and include court clerks and other staff in outreach and education programs relating to corruption.
- Continue to use the model court in Kandal province for important lessons that are transferable to other courts.
- Develop court recording systems on a pilot basis.
- Evaluate the relationship between court salaries and informal payments in the courts.

X. Foreign Direct Investment

A. Introduction

Cambodia's high supply of a low-wage labor force has enabled significant growth in the garment manufacturing industry, and garments account for nearly 90 percent of the country's exports.⁶⁵ Since the termination of the Multi-Fiber Agreement on January 1, 2005, Cambodia has experienced an influx of garment investors – raising the number of garment companies from approximately 250 to 300 in 2005, with many more having received government approval⁶⁶ – who have moved their operations away from Central America and other regions where labor or general industrial costs are currently higher. Nonetheless, the Asian Development Bank noted that the garment sector “is likely to be hurt by increased competition in world markets, especially from the Peoples' Republic of China where production costs are up to 30% lower.”⁶⁷

At this time, other than garments, the primary industries attracting outside investment are cement, petroleum, wood processing, and, to a lesser extent, mining, energy, and food processing. Agriculture, beyond some limited investment, particularly in rubber, has not achieved its potential. While agriculture accounts for about 43 percent of GDP and provides for 70 percent of the country's workforce, it accounts for just five percent of exports.⁶⁸ However, there is potential for growth in these industries, and Cambodia's growing attractiveness as an investment destination is unmistakable: a November 2007 investor's forum attracted 600 paid participants, about half from outside of the country.

At this time, companies that invest in Cambodia typically do so for the purpose of developing products for export, rather than for accessing local markets. With a real per capita income of only \$512 per annum⁶⁹ (although purchasing power is five times greater),⁷⁰ Cambodians cannot

Comparing Cambodia to the World: Rankings that Foreign Investors Notice

Ease of doing business

World Bank *Doing Business* 2008 (2007)
145 out of 178

Economic Freedom

Heritage Foundation
Index of Economic Freedom 2007
130 out of 157

Corruption

Transparency International
Corruption Perceptions Index (2007)
163 out of 178

GDP per capita (purchasing parity \$2,800)

CIA World Factbook (2007)

⁶⁵ Investment Guide, *supra* note 47 at 16.

⁶⁶ See Cambodian Investment Board, Analysis of Capital by Sector (August 1, 2004–December 31, 2005) (noting CIB approval of 466 garment projects valued at nearly \$690,000 in fixed assets).

⁶⁷ Asian Development Bank, Asian Development Overview 2005 (Cambodia), available at <http://www.adb.org/Documents/Books/ADO/2005/cam.asp>.

⁶⁸ Council for Development in Cambodia, Invest in Cambodia: Open for Business – Investment & Tourism (2004) at 51.

⁶⁹ IMF Country Report No. 07/290 : Cambodia: 2007 Article IV Consultation (August 2007) at 19, available at <https://www.imf.org/external/pubs/ft/scr/2007/cr07290.pdf>.

⁷⁰ Investment Guide, *supra* note 47, at 9

afford many of the products they manufacture. That said, trade statistics show that Cambodia is importing more goods than ever before, much of which is for domestic consumption.

Relative to its neighbors, Cambodia offers a number of advantages that are of interest to investors. These include a relatively competitive economy that is not dominated by state-owned enterprises; a location at the heart of Southeast Asia, including a deep-water port; a robust civil society and non-government organization (NGO) sector; and its progressive Labor Law. Cambodia's central challenges with respect to developing foreign investment include development and implementation of its legal infrastructure; vast curbs on corruption; continued cultivation of its human resources; continued development of its physical infrastructure; and reduction of energy costs.

B. Legal Framework

Building a WTO-consistent legal infrastructure. Cambodia joined the WTO on October 13, 2004, a national triumph as it was the first of the so-called Least Developed Countries to join the organization after its initial establishment. A flurry of legislative activity took place prior to accession, including enactment of amendments to the Law on Investment and a series of laws pertaining to intellectual property.

The process of legislative enactment in Cambodia entails many positive and democratic steps, including public education, consensus-building, solicitation of input, and training of professionals. At the same time, however, the process of enacting new laws can be hampered by political infighting, preservation of personal interests, and duplicative bureaucratic processes. Although the February 2006 portion of this diagnostic suggested that development of a new legal framework seemed to be languishing, the following 18 months demonstrated significant progress in the emergence of a business-friendly legal regime.

Investment Law. The legislation that currently sets the parameters for foreign investment in Cambodia is the **Law on Amendment to the Law on Investment (March 2003)**, which updates a prior investment law enacted in 1994. Significantly, most internet postings of Cambodia's investment law do not include the 2003 amendments (although some reports indicate that they have become available); prospective investors, accordingly, are not easily directed to the most up-to-date law. Pursuant to its original form and 2003 amendments, the Investment Law:

- Defines various key terms within the Cambodian investment regime, including most importantly the Qualified Investment Project (QIP), which is an investment project that has received a final registration certificate (Chapter 1). The QIP is Cambodia's alternative to the foreign investment license required in neighboring countries – that is, all investors, both domestic and foreign, that seek to take advantage of formal incentives must obtain a QIP.
- Establishes the Council for Development of Cambodia (CDC), including its three executive boards, one for rehabilitation and development, one for investment, and one for special economic zones (Chapter 2).

- Sets forth the general procedures for investment, including requisite timeframes under which conditional and final registration certificates are provided by the CDC, which is also supposed to serve as a one-stop shop for licenses (Chapter 3).
- Lists investor guarantees, which include protection from nationalization and the ability to repatriate profits (Chapter 4).
- Creates incentives for investors, including tax holidays, exemption from import duties for production equipment and raw materials, and exemption from most export duties (Chapter 5).
- Allows for relatively liberal treatment of employment of foreign nationals, refraining from a bright-line limitation of the number of foreigners a company may employ (Chapter 7). Many investors agree that Cambodia's willingness for foreign companies to employ foreign skilled workers represents an important understanding of the limitations of its own workforce.

The amended Law on Investment applies equally to foreign and domestic investors in all areas except for land ownership. As noted in Chapter 6 of the Law, land ownership is restricted to persons holding Cambodian citizenship or Cambodian entities, defined as companies of which Cambodian citizens own at least 51 percent. However, foreigners may obtain long-term leases lasting from 70-99 years, depending on how they use the property.

Other protections beyond national security interests have been extended to Cambodian businesses. For example, following the enactment of the Investment Law (2003), the government established a sub-decree restricting foreign ownership of hospitals and clinics and forbidding the employment of non-Cambodian doctors in any specialty in which the Ministry of Health considers there to be an adequate number of Cambodian practitioners. While other sectors are eligible for 100 percent foreign investment, investment incentives vary according to the nature of the investment project. For example, according to Cambodia's 1995 law on the Establishment of the Bar, foreign business firms that wish to offer legal services in Cambodia must affiliate with a Cambodian attorney.

Protections afforded investors under the Law are considered relatively strong, as evidenced by its international ranking of 55th out of 158 countries rated in the Investor Protections section in the World Bank's Doing Business report in 2006.⁷¹ All sectors are open to foreign investors except those related to national security. Although Cambodia offers certain tax incentives to eligible investors, it does not offer them financial incentives. This does not in itself constitute a weakness in the legal framework, given the relative lack of impact incentives have been shown to have in other countries. However, the expatriate legal community perceives the absence of tangible financial incentives as suggesting a lack of commitment to encouraging foreign investment. The real disincentives lie in the absence of a comprehensive legal infrastructure under which business can be conducted.

71 World Bank, Doing Business in 2006 (2005), available at www.doingbusiness.org.

In September 2005, the government enacted a **Sub-Decree on the Implementation of the Amendment to the Law on Investment**, which provides important and significant regulatory details on the following matters:

- Acquisition of registration certificates
- Registration approval or denial
- Conditional registrations
- Revocation or cancellation of revocation
- Acquisition and mergers of QIPs
- Joint ventures
- Taxation, including customs duty exemptions on production inputs
- Reporting obligations and certificates of compliance
- Enterprise ownership and land use
- Labor force issues
- Penalties for failure to comply with the sub-decree or Law on Investment
- Prohibited investment activities and investment activities not eligible for incentives
- Investment applications and related forms.

Like the amended Investment Law, the sub-decree is difficult to find on the internet. Prospective investors would benefit from improved access to this sub-decree.

Other laws of interest to foreign investors. Once the CDC grants a conditional license to an investor, the enterprise must begin to satisfy its obligations under the **Law on Commercial Enterprises** (2005). Within 28 working days, the CDC is obliged under the new law to provide assistance with this procedure, as well as with obtaining relevant licenses, such as those required by the Ministry of Industry, Mines, and Energy; the Ministry of Tourism; the Ministry of Health; the Ministry of Agriculture; or other ministries according to the nature of the investment activity. (Foreign commentators expressed doubt that this one-stop-shop function, which was not yet in place, would actually work.) New enterprises must also, when planning on constructing one or more buildings, seek and obtain permissions from local authorities and/or the Ministry of Land Management, Urban Planning, and Construction. Where relevant, an initial environmental impact assessment must be sought from the Ministry of Environment. Tax registration at the Ministry of Economy and Finance is also required.

The **Law on Amendment of the Law on Taxation** (2003) governs taxation in Cambodia, including the functions and management of taxation activities. Cambodia's tax law is more competitive for investors than others in the region: its corporate tax rate of 20 percent (except on the exploitation of natural resources) contrasts with the systems in Indonesia (15-30 percent), Malaysia (28 percent), the Philippines (32 percent), Singapore (22 percent), Thailand (30 percent) and Vietnam (25-32 percent).

Cambodia's comprehensive **Labor Law** (1997) is unique not only in the region, but also in the world. In 1994, with the support of International Labor Organization and the French Ministry of Labor, Cambodia's Ministry of Social Affairs, Labor, and Veterans began drafting a new law based on the country's existing 1992 Labor Law and other various labor-related documents, as well as on the 1993 Constitution. The resulting Labor Law provides a great deal of freedom with

respect to establishing trade unions and the rights to strike and to lock out provisions that were not available in previous laws. The Labor Law also established the Council of Arbitration, which is a mechanism for resolving collective bargaining disputes. As discussed elsewhere in this report, the Council has proven highly successful and free of the outside influences that hamper other tribunals in Cambodia. It is widely referred to as a best practice for the region.

As of 2002, there were 245 registered trade unions in Cambodia, 218 of which are in the garment sector.⁷² Strikes over wages and working conditions in Cambodia, not only in the garment sector but also in hotels and other industries, have become common. Although some foreign investors complain that the rights granted to Cambodian workers drive up their costs relative to other countries in the region – in particular China and Bangladesh – the prevailing long-term view is that international manufacturers who are concerned about scrutiny of their labor practices will view Cambodia's relatively strong protection of workers as a positive force.

With respect to resolution of investment disputes, in January 2005 Cambodia entered into force its ratification of the **Convention on the Settlement of Investment Disputes between States and Nationals of Other States**.

Cambodia holds **Bilateral Investment Treaties** with several of its major trading partners, including China and each of its neighboring countries except, apparently, Laos.⁷³ Cambodia became the 151st member of the **Multilateral Investment Guarantee Agreement** in 1999.

C. Implementing Institutions

Oversight of foreign investment policy takes place within the **Council for Development of Cambodia** and the **Ministry of Commerce**. The CDC is an executive agency with a governing body drawn from the Cabinet. The CDC has three executive boards: (1) the **Cambodian Rehabilitation and Development Board**, which oversees public investment and coordination of international assistance, (2) the **Cambodian Investment Board**, which deals with private investment; and (3) the **Cambodian Special Economic Zones Board**, which deals with special economic zones.

The CDC suffers from underfunding and weaknesses in capacity. The CDC's website, which should be an attractive window on investment conditions and opportunities in Cambodia, is incomplete and outdated. The site does not, for example, provide the Amended Law on Investment, and its tax information is similarly out of date. General country information also is often out of date. Although the site allows for online application for an investment license, the lack of explanatory information makes this option unworkable.

The CDC is charged with maintaining statistics relating to foreign investment. There are clear limitations in the CDC's ability to quantify investments, however. Although the CDC records invested capital that it has approved, it does not track whether approved projects are actually

72 Malcolm Falkus and Stephen Frost, *Labour Relations and Regulations in Cambodia: Theory and Practice*, Working Paper Series No. 38, Southeast Asia Research Center, City University of Hong Kong (2002).

73 Copies of Cambodia's BITs can be found through the United Nations Conference on Trade and Development web site, available at <http://www.unctadxi.org/templates/DocSearch.aspx?id=779>.

carried out. The best data about FDI would come from Balance of Payments records; however, this is information that has not been accurately maintained. The general unreliability of information in Cambodia is an economic issue.

The CDC's priorities seem to focus on the development of special free trade zones, as administered through the **Cambodian Special Economic Zones Board**. The 11 zones approved to date aspire to serve as one-stop shops for investors, which the CDC hopes will include manufacturers of electronics and consumer goods such as food, beer, and household products. Garment manufactures are not envisioned to be part of these zones because the wages afforded most garment workers are significantly less than those hoped for within the zones.

The CDC appears only marginally involved in the type of promotion activities that are characteristic of some of its neighbors, in particular Vietnam. The CDC is behind in developing attractive, comprehensive, and effective promotional materials; publishing regular newsletters and updates; and engaging in other investment promotion activities, such as overseas promotional events.

The **Ministry of Commerce** similarly could better manage and showcase the information that investors need. Although its website, at first glance, provides English-language copies of many laws and regulation, more careful study shows that the legal collection is outdated and incomplete.

D. Supporting Institutions

Cambodia has a vibrant non-government sector that encourages foreign direct investment. In addition, professional associations, business support firms, and consulting companies are strong and growing. In the provinces, small business associations are becoming increasingly active, generally with the support of the donor community.

As of November 2007, 12 provinces now have **Chambers of Commerce**, including Kompong Cham, Pursat, Battambang, Sihanoukville, Banteaymeanchey, Takeo, Kampot, Kandal, Kompong Speu, Siem Reap, and Koh Kong. Each chamber has 15 elected members. The Phnom Penh Chamber of Commerce is composed of 40 elected members, 40 advisers, and 5,750 ordinary members who conduct their businesses and enterprises throughout the country. In September 2007, the Chamber of Commerce of Cambodia was established. It has 12 elected members. The principal mission of the Chambers is to seek foreign investment in the private sector and donor support for training programs for its members in occupational trade, international industry standards for export, and general business skills.

Pursuant to a 1995 Law on Chambers of Commerce, the government exercises a significant degree of control over the Chambers. Article 2 of the law provides that “each Chamber of Commerce in a province or municipality shall be established by a sub-decree upon a proposal by the Ministry of Commerce. The limit of the jurisdiction of each Chamber of Commerce shall be determined by the sub-decree that establishes it.”

There are four principal sector groupings of the Phnom Penh Chamber: Commercial; Industry and Handicraft; Services; and Agriculture. These groups meet monthly and report issues to the semi-annual meeting of the Government-Private Sector Forum hosted by the Prime Minister (see below).

The **Garment Manufactures Association of Cambodia (GMAC)**, which accounts for about 90 percent of exports from Cambodia, is enormously influential. In 2003, almost 90 percent of the garment manufacturers were foreign-owned, including from Hong Kong, China, Singapore, Taipei, South Korea, Malaysia, Thailand, Indonesia, Bangladesh, England, Germany, Australia, Canada, and the United States. Membership in GMAC is essentially mandatory – private sector representatives report that a company cannot get an export license without it. The organization’s founders claim that mandatory membership is the chief source of its strength. GMAC is vocal and influential with respect to all commercial legislation that is considered or enacted in Cambodia.

The **International Business Club** largely represents the multinational companies in Cambodia. Several associations have been formed by investors from other countries, such as the **Thai Business Council**, the **Chinese Chamber of Commerce in Cambodia**, the **Japanese Business Association**, the **Malaysia Business Council**, the **Taiwan Business Council**, and others.

Cambodia’s recent history has resulted in a **workforce** that, for the most part, is rurally based and virtually without the skills necessary to support a vibrant economy. The process of assisting the workforce in securing better access to education is uneven and slow, but among the skilled workers, increasing opportunities allow for the development of skills. The public law and business faculties are increasingly able to access outside partners and assistance. There are many new private universities, and many scholarship opportunities for study in Japan, the United States, and Europe are available. Among the more educated classes, facility with the English language is relatively strong.

Representatives of **the investor community** generally pronounce themselves satisfied with the opportunities they have to comment on the emergence of law and policy – stakeholder input into law can be “huge,” according to one observer. Since 1999, the government has instituted two mechanisms for the private sector to influence the development of law and policy: the **Private Sector Forum** and the **Working Group Process**. Eight Working Groups address the following issues: agriculture, export processing, banking and finance, infrastructure, tourism, labor group relations, manufacturing and distribution and cross-cutting issues of law, tax, and good governance. The Working Groups are co-chaired by the respective Minister involved in the subject matter and meet monthly. The topics they address form the substance of the bi-annual Private Sector Forum.

The **Government-Private Sector Forum (G-PSF)** meets every six months with the entire Council of Ministers. Significantly, these meetings are televised live. As one participant has commented, “The entire nation can see ordinary citizens interacting with the government, even criticizing its policies. This type of activity is unprecedented, given Cambodia’s Royalist and

communist antecedents.”⁷⁴ An evaluation of the G-PSF in 2007 reported the interactions between the two groups very useful and positive, although it did call for greater opportunities for the small business community to participate.

Cambodia does not yet have a **routinely updated, free-of-charge, comprehensive source of laws in English that outside investors can access** when they are considering the possibility of investing in Cambodia. Although some donor-sponsored attempts have been made to list and publish the laws on the internet, they do not seem to have kept up with the changing legal environment. For example, most web sources continue to publish Cambodia’s Law on Investment as it was enacted in 1994, but do not show its most recent iteration following important amendments in 2003. One source, *An Investment Guide to Cambodia*, published in September 2003 by the UN in cooperation with the International Chamber of Commerce, lists most major laws and regulations affecting foreign investment as of September 2003. The CDC, published another Investment Guidebook in 2007, in conjunction with the Japan International Cooperation Agency (JICA). Although very useful, it does not appear to be readily accessible over the internet.

On the other hand, a relatively strong set of **for-profit law firms and consulting companies** exist to help potential investors navigate Cambodia’s legal environment once they launch a more detailed inquiry into the country. NGOs that provide economic advice and research services tend to be highly dependant on donor support.

Cambodia has a substantial **donor presence**. Of the \$601 million pledged by donors for 2006, the European Union pledged the largest amount of \$164 million, followed by Japan at \$114.7 million, the United States \$61 million, and the United Nations \$58.1 million. The World Bank pledged \$53 million.⁷⁵ The high level of donor involvement comes with inevitable challenges and problems in disbursement and delivery of projects. Japan provides many vibrant programs relating to many sectors of the economy; however, the relatively low level of Japanese investment in the country is noteworthy.

The **courts and the judiciary** generally are regarded as a negative factor with respect to foreign investors. One observer’s comment that there is “utterly no judicial independence” is typical and, thus, there is little confidence on the part of foreigners that, if they need to access the courts, a predictable and fair outcome is likely. There is “hope for justice,” it is said, only within small civil disputes, where neither money nor politics may be a factor. The existence of criminal remedies with respect to commercial or civil issues – e.g., penalties arising from alleged breach of contract, considered a “breach of trust” – serves as a discouraging factor. The sluggishness of the courts is also notorious, with the threat that any commercial court case can easily get tied up indefinitely in the appeals process.

Unlike neighboring Laos and, to a certain extent, Vietnam, the print **media** in Cambodia is very free, and thus information about issues of interest to foreign investors is widely available. On the

74 Bretton G. Sciaroni, “Talking to the Royal Government,” in Council for Development in Cambodia, *Invest in Cambodia: Open for Business – Investment & Tourism* (2004) at 18-19.

75 Reuters, “Donors Give Cambodia \$601 Million in Aid for 2006,” (March 7, 2006).

other hand, television broadcasting is reportedly controlled by the government, which makes it a less thorough and objective source.

Finally, Cambodia's investment environment will continuously be affected by **regional investors in infrastructure**. According to news reports in 2006, China planned to invest \$600 million in some of Cambodia's major infrastructure projects. Half of the aid and loan package, which is equivalent to the total annual aid to Cambodia from all international donors, will finance a hydroelectric plant project, while about \$200 million will support the construction of two major bridges across the Mekong and Tonle Sap. The rest will fund other projects such as replacing the decaying Council of Ministers building.

Similarly, as of February 2006, South Korea indicated plans to invest in Cambodian infrastructure projects. In addition to a \$26.7 million loan for an irrigation project, the two countries were discussing another \$60 million for road construction and information technology programs.

E. Social Dynamics

The legislative drafting process. A significant concern voiced by non-garment foreign investors in February 2006 was the absence of a true rule of law and, in particular, the absence of a clear and accessible set of commercial laws suited for a market-based economy. By late 2007, this perception was beginning to change. In December 2004, the seventh meeting of the Cambodian Development Coordination Forum (CDCF) of donors identified eight key laws that did not yet exist in modern form: (1) a penal (criminal) code; (2) a code of penal (criminal) procedure; (3) a civil code; (4) a code of civil procedure; (5) a law on the organization and functioning of the courts; (6) a law that would ensure transparency in the appointment, promotion, and remuneration of judges and prosecutors, as well as the independence of judges and prosecutors; (7) a revised Law on the Organization and Functioning of the Supreme Council of Magistracy; and (8) an anti-corruption law.⁷⁶ At the CDCF's eighth meeting on March 2-3, 2006, it was noted that, notwithstanding some progress, none of these laws had been enacted.⁷⁷ But by November 2007, laws on penal and civil procedure had been enacted, and the civil code had been passed by the National Assembly and was expected to receive final enactment soon. However, five recommended laws remain outstanding.

Moreover, enactment of the commercial enterprises law (2005), the commercial arbitration law (2006), a sub-decree on economic zones (2005), and the secured transactions law (2007) were considered evidence of increasing government commitment to the establishment of a modern legal regime for commercial transactions.

Indeed, a long legislative drafting process is not a bad thing in itself. The process of developing law should be a dynamic activity that "includes research, debate, negotiation, public education, outreach, institutional capacity building in parliament, revisions of drafts based on local political

76 Cambodian Development Coordination Forum Meeting on Cambodia (December 6-7, 2004), 2004 Priority Monitoring Indicators, at 2.

77 Cambodian Development Coordination Forum Meeting on Cambodia (March 2-3, 2006), Opening Remarks of Co-Chair Ian C. Porter.

compromises and a host of other steps.”⁷⁸ Moreover, in Cambodia, stakeholder input into the legislative drafting process is one area where foreign investors claim to be satisfied. The Working Group process in the Chamber of Commerce and the Government-Private Sector Forum have allowed for significant and meaningful interaction between the private and public sectors.

Other investor priorities. If Cambodia is to experience growth in outside investments beyond the garment industry, corruption in government needs to be addressed. In addition, growth in tourism and agriculture investment will depend on the improvement of Cambodia’s physical infrastructure, which, through the construction of roads and improvement and opening of new airports, is proceeding. It may also turn on increased integration and harmonization of opportunities available on a regional basis, including transportation, trade facilitation, and legal requirements. Similarly, decreasing the cost of energy is a major concern. Finally, the need for a better educated and healthier workforce remains a long-term priority.

F. Recommendations

- Check all major internet postings of the Investment Law and make sure they are updated to include 2003 amendments.
- Develop (or update previously developed) one or more free-of-charge, comprehensive sources of laws in English for outside investors to consider when they are looking at the possibility of investing in Cambodia. This is a critical source even before potential investors contact local firms to assist them in the investment process.
- Provide support to the CDC in its investment promotion activities, including improvement of its website, development of stronger promotional materials, and bolstering of its ability to participate in investment fairs and other similar opportunities.
- For the benefit of foreign investors, the sub-group of laws, regulations, and court decisions that specifically pertain to commercial matters must be catalogued, translated, and placed online. This information must be continuously updated.
- The wide variety of FDI-related donor initiatives should be continuously catalogued, monitored, and coordinated.

78 Wade Channell, *Lessons Not Learned: Problems with Western Aid for Law Reform in Postcommunist Countries* (Carnegie Paper No. 57, March 2005) at 9.

XI. International Trade Law and Policy

A. Introduction

In recent years, Cambodia has used its place at the heart of Southeast Asia to engage the various mechanisms of free trade for the purpose of building its economy. The country's entry into the World Trade Organization (WTO) in 2004 was an enormous achievement, signaling to the world that, after years of internal conflict, Cambodia is ready to conduct business under a common set of rules. In addition, Cambodia has developed several bilateral trade agreements and is particularly active in regional initiatives, including the Association of Southeast Asian Nations (ASEAN).

Yet Cambodia's acceptance of liberalized trade as a critical component of its development is not enough. Cambodia's immediate challenge is to integrate the commitments of its membership in bilateral, regional, and international trade agreements into its legal and institutional infrastructure. This challenge includes meeting its many specific commitments pertaining to trade made during the WTO accession process,⁷⁹ as well as enacting a comprehensive legal framework, which is necessary for the new trade rules to be properly executed.

B. Legal Framework

Bilateral trade agreements. Since 1993, Cambodia has concluded at least 19 bilateral agreements and 8 memoranda of understanding related to economic cooperation, foreign trade, promotion and protection of investment, and intellectual property rights protection with 20 countries, including China, Indonesia, Malaysia, Laos, Vietnam, Thailand, the Russian Federation, the United States, the Philippines, and the European Union (EU).⁸⁰ These bilateral trade agreements contain provisions granting Most Favored Nation treatment on a general or specific basis. In addition, Cambodia's major bilateral agreements include a Memorandum of Mutual Cooperation on Intellectual Property with Thailand; an Agreement on Cultural and Scientific Cooperation with the Russian Federation; an Agreement on Economic, Scientific, and Technical Cooperation with Malaysia; a road transit agreement with Laos; and a transit agreement with Vietnam.⁸¹

Cambodia does not have a general Free Trade Agreement with the United States. The U.S.-Cambodia Textile Trade Agreement, however, in place from 1999 through 2004, proved highly influential on the Cambodian economy. This agreement was the first of its kind to link increased access to U.S. markets to improved working conditions in an exporting country. Under the agreement, the U.S. promised Cambodia better access to U.S. markets in exchange for improved working conditions in the garment sector. To monitor improvements, the U.S. engaged the International Labor Organization, through a project entitled "Better Factories Cambodia," to help

79 A summary of these commitments can be found at the document entitled Study on Domestic Economic Impact and Social Costs of Adjustment to the WTO Membership of Cambodia, prepared by the Cambodian Legal Resources Development Center in collaboration with Cambodia's Ministry of Commerce (March 25, 2004).

80 See World Trade Organization, Report of the Working Party on the Accession of Cambodia (August 15, 2003) at 49, available at <http://docsonline.wto.org/DDFDocuments/t/WT/ACC/KHM21.doc>.

81 Id.

the sector make and maintain these improvements. The program entails unannounced factory visits to check on working conditions and separate, confidential interviews with workers, management, factory shop stewards, and union leaders. It also includes training for workers and management on occupational health and safety, effective management of work time, first aid, and other issues.⁸² Upon demonstrated improvements in factory conditions, the United States increased its quotas for imports and became, by far, Cambodia's largest trading partner. In 2004, more than 55 percent of the goods that Cambodia exported, representing more than 30 percent of Cambodia's GDP, went to the United States. More than 80 percent of the goods exported to the United States are garments. While Cambodia exported \$2.2 billion worth of goods to the United States in 2006, it imported just \$74.5 million worth of goods from the United States.⁸³ Additionally, the United States and Cambodia are involved in discussions on a trade investment Frameworks Agreement, on which they held meetings in February and November 2007.

Cambodia's bilateral trading agreement with the EU, entitled the *Cooperation Agreement between the European Community and the Kingdom of Cambodia*, came into force in 1999. In 2006, exports from Cambodia to the EU totaled US\$650 million, ranking the EU as Cambodia's second most important destination for exports. Main importing countries were Germany, the United Kingdom, and France. Imports from the EU totaled \$261 million in 2006. Main imports included electrical machinery, equipment and parts, pharmaceutical products, and mechanical machinery. The main exporting countries were France, Germany, and Austria.

Regional trade. Although intra-regional trade was not a major force within ASEAN between 1995 and 2003, when it did not amount to more than 10-15 percent of total ASEAN trade, this fact has changed. In 2005, intra-ASEAN trade constituted about 25 percent of total trade.

The ASEAN Free-Trade Area (AFTA), first launched in 1992, now covers all ASEAN member countries and has resulted in the reduction of tariffs for over 4,000 categories of products since 2000. The ASEAN Common Effective Preferential Tariff Scheme (CEPT) has proven difficult to implement;⁸⁴ nonetheless, members remain committed to its continued use. The CEPT scheme covers nearly 98 percent of all tariff lines in ASEAN and contemplates that tariffs among ASEAN countries will be between zero and five percent by 2010. The only products not included in the CEPT scheme will be those in a General Exceptions category. Over the course of several years, ASEAN's initial program of tariff reductions has accelerated and broadened to include other "AFTA Plus" activities. These include efforts to eliminate non-tariff barriers by 2050; harmonize customs nomenclature, valuation, and procedures; and develop common product certification standards, among others. Although the original ASEAN members have a faster timetable for implementation than its newer members, Cambodia's CEPT commitments must be implemented by 2010.⁸⁵

At the ASEAN conference held on November 20, 2007, the member countries signed a charter integrating the region into a single unit along the lines of the EU model and committed to a speedy ratification, revealing a desire to further advancing the region's unification.

82 More information about Better Factories Cambodia can be found at www.betterfactories.org.

83 U.S. Census Bureau, Foreign Trade Statistics (2006).

84 Id.

85 Id.

In addition to AFTA, market-broadening opportunities afforded through ASEAN include the proposed China-ASEAN Free Trade Area and a possible India-ASEAN Free Trade Area, currently under negotiation. Other agreements in negotiation include ones between ASEAN and Japan, South Korea, and Australia/New Zealand. The significance of these agreements is prospectively that of long-term growth in regional trade, thus diminishing regional dependence on U.S. and European markets.

WTO accession. Cambodia joined the WTO in 2004. At the time of accession, the country committed to a host of legislative, regulatory, and practical reforms, including changes pertaining to: state ownership and privatization; pricing policies; import and export rights; customs duties and charges; tariff rate quotas and exemptions; application of internal taxes; quantitative import restrictions, including elimination of quotas on various categories of imports; rules of origin; customs formalities, including a dispute settlement mechanism within the Cambodian Customs agency; export restrictions; export subsidies; agricultural policies; and others.⁸⁶

In addition, pursuant to the terms of WTO accession, Cambodia agreed to follow the Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement no later than January 1, 2007, although the WTO extended this deadline (for all Least Developed Country members) to July 2013.⁸⁷ Cambodia is further obliged to fully implement the WTO's Custom's Valuation Agreement no later than January 1, 2009. With respect to sanitary and phytosanitary measures (SPS), Cambodia agreed to fully implement the WTO's SPS agreement by January 1, 2008, and to consult with WTO members upon request if they deem any measures applied during the transition period as negatively affecting their trade with Cambodia. Finally, in January 2007 Cambodia became obliged to implement the Technical Barriers to Trade Agreement in full.⁸⁸

Customs and tariffs. Cambodia's tariff schedule is consistent with the ASEAN Harmonized Tariff Nomenclature, which is itself based on the Harmonized System (HS) 2002 of the World Customs Organization. However, the difference in Cambodia between the written word and practice is enormous and almost never consistent in the area of customs, due to the vast structure of informal facilitation fees in the customs arena. Against this backdrop of corruption, the so-called black-letter law – in this case, the published tariff schedules – is almost immaterial.

Trade remedies. Cambodia has not yet developed any trade remedy legislation. According to Cambodia's representations during WTO negotiations,⁸⁹ laws on anti-dumping and countervailing measures and safeguard measures were not expected to be enacted until the second half of 2004. To date, they do not seem even to be in draft form. Through its Multilateral Trade Assistance Project (MULTRAP) initiative in Cambodia, the EU has provided some technical assistance, including sharing model laws on trade remedies and workshops for civil

86 Study on Domestic Economic Impact and Social Costs of Adjustment to the WTO Membership of Cambodia, *supra* note 90, at 4-6.

87 CNN, "Poor Countries win Rules Extension" (November 30, 2005).

88 Study on Domestic Economic Impact and Social Costs of Adjustment to the WTO Membership of Cambodia, *supra* note 90, at 7.

89 See Report of the Working Party on the Accession of Cambodia, *supra* note 93.

servants. At this time, any movement toward trade remedy legislation is almost entirely donor-driven and interest and expertise from within is minimal.

C. Implementing Institutions

The **Council of Ministers** plays an important role in the development and execution of trade policy. No legislative or substantial regulatory reform takes place without the facilitation of the Council, some of whose members typically wait for direction from the **Prime Minister**. For example, at the time of this diagnostic, the World Bank's trade facilitation agenda had not yet received the endorsement of the Council, which meant that that program lacked a critical buy-in from a group of individuals who hold power to effect change.

The **Ministry of Commerce** is Cambodia's principal ministerial authority in bilateral, regional, and multilateral trade negotiations and in implementation of trade-related laws.

The **Ministry of Tourism** has taken significant steps toward encouraging increased investment in tourism in Cambodia, particularly through streamlined facilitation of the movement of people. It is one of the more effective ministries and operates a relatively strong website that sets forth the scope of its responsibilities. The Ministry maintains tourism statistics, regulates hotels and other entertainment sources, promotes cultural tourism, and engages in long-term planning for development of tourism in Cambodia.

D. Supporting Institutions

Perhaps the most critical set of institutions engaged in the support of international trade law and policy in Cambodia is the **donor community**. Cambodia is part of the **Integrated Framework**, a multi-donor, multi-agency initiative that assists Least Developed Countries in their efforts to expand their participation in the global economy through, among other strategies, leveraging donor assistance that is available. Of the \$601 million pledged by donors for 2006, the **EU** pledged \$164 million, followed by **Japan** at \$114.7 million, the **United States** at \$61 million, and the **United Nations** at \$58.1 million. The **World Bank** pledged \$53 million.⁹⁰ **Australia**, the **Asian Development Bank**, the **International Monetary Fund**, and others also contribute to the trade policy environment.

Coordination among donors has said to be weak in the past but has improved considerably, particularly through the Cambodian Development Coordination Forum (CDCF) mechanism endorsed by the government. The CDCF, a regular meeting of the government and its development partners, is designed to discuss a range of development issues and challenges and assess financing needs for future development programs. The CDCF meeting is supplemented by year-long aid coordination work through a number of Working Groups – discussed in this report's chapter on foreign direct investment – covering different aspects of development who meet regularly, and quarterly update meetings assessing progress made and identifying emerging challenges. The CDCF mechanism is an important method of tracking commitments and progress.

90 Reuters, "Donors Give Cambodia \$601 Million in Aid For 2006" (March 7, 2006).

On the other hand, the issue of “donor distortion” in Cambodia is one that warrants careful scrutiny. As noted by one observer, outsiders often set reform priorities without fully understanding the actual environment in which they are dealing. (The example cited was that of a hypothetical decision that a certain set of funds will be directed to the development of silk farms, as opposed to chicken raising or growing fruit.) Donors can unintentionally remove the incentive of individuals to understand their own role in setting economic priorities – e.g., through the decision of what type of crop to grow – and their own responsibility for success or failure. It is also worth considering whether donor bias in favor of one legal system or another has resulted in an unnecessarily disjointed legislative framework.

Discussed in detail elsewhere in this report, the **Garment Manufacturers Association of Cambodia (GMAC)** is the strongest of the active trade associations. The GMAC serves as an important lobbying group for trade facilitation, and its members participate in trade negotiations involving international agreements and interact with international organizations to promote the garment sector.

Although 12 provinces now have **Chambers of Commerce**, the strongest one is in Phnom Penh. Over 5,000 private businesses, or at least 30 percent of the total formally registered enterprises, belong to this organization in which general membership is free. The principal mission of the chambers is to seek foreign investment in the private sector and donor support for training programs for its members in occupational trades, international industry standards for export, and general business skills. In its advocacy role, the four principal sectors groupings of the Chamber – Commercial, Industry and Handicraft, Services, and Agriculture – meet monthly and report issues to the semi-annual meeting of the Private Sector Forum hosted by the Prime Minister.

In addition, the **International Business Club** largely represents the multinational companies in Cambodia. Several associations have been formed by investors from other countries, such as the **Thai Business Council**, the **Chinese Chamber of Commerce in Cambodia**, the **Japanese Business Association**, the **Malaysia Business Council**, the **Taiwan Commercial Association in Cambodia**, and others.

Smaller **business associations** are growing in the provinces and are of particular relevance to the growth of small and medium-sized enterprises (SMEs) and the connection of SMEs to opportunities in international trade. That said, SMEs represent an under-exploited area of growth in Cambodia. At this time, SMEs play very little role in the development of international trade policy – its arguable that few are even competent to do so – and the government reportedly treats foreign suppliers, foreign customers, and large enterprises as the only groups worth integrating into policy discussions. Yet there are many opportunities in free trade that can benefit small businesses, ranging from transporters to service providers to small manufacturers. Ultimately, SMEs can and should serve as a driver of growth to a much greater degree in the future. The next generation will be critical in terms of assisting businesses in their formalization, establishment, access to markets and capital, regulatory compliance, and overall growth. In addition, SMEs can begin to benefit from improved structures of corporate governance so that, in the future, they can become more desirable outlets for outside investment. (One accountant commented that progress in this area has already begun: “I feel that local companies are starting to get their books in

order,” he stated.) At this time, certain donor support is directed to the capacity-building of SMEs, and micro-credit has proven relatively successful. Still, SMEs are not yet fully integrated into the government’s strategy for development.

A relatively strong set of **non-government organizations (NGOs)** and **think tanks** support the study and analysis of trade policy in Cambodia. These organizations tend to be highly dependant on donor support.

E. Social Dynamics

The primary source of Cambodia’s strong growth in recent years has been garments, which represent about 90 percent of exports. This, of course, should change. Garment manufacturing necessarily relies on the cheapest labor possible; Cambodia needs a broader array of options. Beyond garment manufacturing, the key opportunities in trade are tourism, commercial agriculture and agro-processing, light manufacturing, infrastructure development, and services such as education (with an emphasis on technical skills) and health.⁹¹

Although there is a strong case for distinguishing itself from its neighbors, Cambodia must be mindful of regional dynamics that call for cooperation and consultation with its neighbors in the area of trade development. Several sources point out that, in the area of tourism, the contiguous countries of Cambodia, Vietnam, Laos, and Thailand should develop some harmonized mechanisms for improved delivery of services. A single visa, or perhaps a single visa process, is one idea. In addition, as markets for services in the region grow, these countries can benefit from more effort at harmonized approaches to trade facilitation, access to credit, and commercial legislation, among other areas.

F. Recommendations

- A donor or an interested, objective member of civil society should track Cambodia’s compliance with its WTO accession commitments, including both its technical commitments to trade facilitation and its representations pertaining to improved national legislation. The purpose of this effort is to be able to clearly demonstrate where government efforts are taking place, and where they are lagging.
- The Ministry of Commerce should receive technical assistance and capacity building, with special attention to coordination of assistance and leveraging of resources.
- SMEs should be considered a critical player in the development of trade law and policy. Business association support should continue, with increased emphasis on building SMEs into the international trade regime.
- The “Better Factories Cambodia” program should be continuously monitored for impact and lessons learned that may help support improved labor conditions through trade arrangements in the future.

91 Investment Guide, *supra* note 47 at 31.

XII. Flow of Goods and Services

A. Introduction

This chapter analyzes the legal, institutional, and operational constraints that impede trade expansion and recommends ways to minimize those constraints. First, the analysis focuses on Cambodia's legal framework for the Customs and Excise Department of Cambodia (CED), located within the Ministry of Economy and Finance. Second, the chapter considers the institutional issues regarding CED management, organizational capacity, and operations. Third, the chapter reviews the other key public and private institutions. In the public arena, the focus is on the other major borders institution, the Ministry of Commerce's Cambodia Import-Export Inspection and Fraud Repression Department (CAMCONTROL). On the private sector sides, the section addresses key supply chain partnership groups such as Customs Brokers, freight forwarders, carriers, and other intermediaries. Fourth, the chapter addresses the social context for reform. The final section sets forth recommendations to improve trade facilitation in Cambodia.

B. Legal Framework

For a fully facilitative trading environment, it is critical that the laws, regulations, decrees, and sub-decrees provide: (1) adequate and coherent authority structures for the essential trade-related institutions; (2) clearly stated regulations and procedures that strike an adequate balance between facilitation and necessary control; and (3) the means to effectively and efficiently employ modern risk management techniques that utilize proper selective inspections and post-release audits in order to strike an appropriate balance between trade facilitation and revenue compliance.

WTO Membership. Cambodia made a major step toward improving trade facilitation by joining the World Trade Organization (WTO) in October 2004. Cambodia requested rapid accession to the WTO, because of the January 2005 deadline for ending the international quota regime for garments. Failure to join would have had a disastrous effect on Cambodia's economy and its garment industry. As a WTO member, Cambodia gained virtually unrestricted access to the WTO marketplace. Cambodia's WTO compliance plan has made significant progress in creating a sound legal framework for Customs administration. Legal certainty that guarantees transparent, predictable, and efficient Customs processes is necessary to continue to attract investment because Cambodia faces fierce competition from other Southeast Asian countries. In addition to the WTO membership, Cambodia has signed various international agreements that provide the legal framework and internationally agreed conventions and standards designed to improve Customs operations.

New Customs Law of 2007. The enactment of the new Customs Law in July 2007 was a major accomplishment. When coupled with the pending implementing regulations, the law should be a significant step in providing certainty to the trade community. The law's passage is the work of several years and included IMF technical assistance. The law supports implementation of the key principles outlined in the 1999 Revised Kyoto Convention (RKC) of the World Customs Organization (WCO) and is in accordance with WTO models. The new law's 34 required

implementing regulations should be completed and published in the first quarter of 2008. Due to the level of technical expertise provided to the CED, practices can be expected to align with accepted international standards. With the new law in place, the trade community should see improved procedures in 2008 and 2009. However, changing attitudes, customs, and business processes will be a challenge. These changes are highly complicated and require a significant departure from current procedures and practices.

Private sector participation in legal reform. The trade community expressed concern about its lack of participation in the drafting of the Customs Law and implementing guidelines. Many trade community members are unaware of changes the legislation requires. As regulations are drafted and implemented, the trade community should be brought into the process as soon as possible. Improved dialogue between the business community, and CED is important in order to foster the improved partnership arrangements and the new law provides a new opportunity to do so. The onus for cooperation does not lay solely with CED. The trade community needs to be more proactive and responsive for meaningful and coordinated engagement with CED.

C. Implementing Institution

CED is the most prominent trade facilitation institution because it collects more than two-thirds total government revenues and is the lead border agency handling commerce.

CED focuses primarily on revenue collection, trade facilitation and protecting society from prohibited and restricted goods. Despite lowering tariff rates, revenue collection has increased significantly, due to an overall increase in economic growth, international trade, improved enforcement, greater compliance and substantially increased anti-smuggling operations. Although trade facilitation has at times lagged behind revenue enhancement as a priority, there appears to be a strong commitment to modernization at the top CED management levels. This core group recognizes the need for improved service through development of transparent, predictable and simple procedures that reduce interventions in the import-export process. However, such a program must also take account of the need to optimize revenue collection through improved compliance levels, since Cambodia is currently so heavily dependent on customs revenue.

Generally speaking, progress has been slow. This is due to several factors, but the most important is the resistance to change that exists both within parts of CED and the private sector in general, often by those benefiting financially from the current environment. Another major factor is inadequate capacity. Although the trade community generally finds little progress, CED should be recognized as having been active in laying the required groundwork within the agency to affect reform.

Reform initiatives. The agency's reform agenda is laid out in its 2007 Action Plan, currently in final draft. The action plan envisions a modern Customs administration. It is consistent with International Monetary Fund (IMF), World Bank, and European Union (EU) reform and modernization guidelines, and it supports WTO and other binding international conventions. The more detailed action items are reflective of the national context and the agency's capacity to absorb and implement the required steps.

The new action plan is the most current iteration of the continuing and well-documented reform programs initiated by the CED since the late 1990s. Among the most significant advances during this period was RCG Sub-decree 21 (2004), which offered a 12-point action plan. The 2004 plan included the streamlining and automation of the Customs process and increased coordination among the border agencies. The plan appointed CED as the single lead border agency and led to the coordination of border examinations, limited fee reduction, and elimination of some licensing requirements. In March 2006, the Prime Minister personally jump-started a reform initiative by mandating risk management techniques and reformed border agency coordination. With this intervention, the plan was finally implemented, and CED became the lead trade border agency.

A number of donors have supported Cambodian trade reform, including the EU, AusAid, IMF, JICA and World Bank. Donor support is generally strong and reasonably well-coordinated but the modernization program is not sufficiently comprehensive at the moment, and there are gaps to be filled. Without further donor support, implementation will be hampered. Assistance should include training, reform monitoring and modern equipment.

Organization/Human Resource Management

CED is the single leading agency for border control and is part of the Ministry of Economy and Finance (MEF). CED is lead by a Delegate of the Royal Government who is assisted by five Deputy Directors. CED headquarters comprises 11 central offices. Cambodia has extensive borders with Vietnam, Thailand, and Laos. There are more than ten major entry points, as well as a number of surveillance border checkpoints with customs stations. There are only 1,320 customs officers available to man these checkpoints and control very long borders, navigable inland waterways, and a lengthy coastline.

The pace and volume of international trade has increased dramatically in the last 10 years, and Customs organizations internationally are increasingly accountable and face greater expectations from their respective governments and partners in the business community. A much higher standard of professional staff, capable of using IT processes and understanding complex trading systems, is now required.

Poor capacity. Improved human resource management and staff development is needed across the whole of CED. Poor capacity is probably the single most important issue to be addressed for organization effectiveness. Although most key management positions are currently occupied by competent professionals, many of the lower ranking officers are insufficiently educated and trained by modern customs standards. As a result, employees do not have the skills to handle the complex challenges customs now requires. Additionally, low compensation, non-merit recruitment, and poor performance evaluation systems remain serious impediments.

Civil service reform. CED has taken a significant first step aimed at addressing these issues by professionalizing a small component of its workforce. Under this plan, it recently instituted careful measures to ensure the recruiting and selection of 124 highly qualified individuals. This effort included a thorough, rigorous, and transparent process involving extensive verification of the stated qualifications of the approximately 5,000 applicants. The process required that the identity of the candidates be unknown to the selecting committee. Commendably, the Director

General and trusted key officials personally oversaw the entire process. Those selected have been placed in key positions in order to assist overall reform efforts. Independent sources report that the new recruits are impressive, and that many represent the best of Cambodian young adults in education and general qualifications. As a matter of sustainability, it is crucial for reform efforts that development and retention efforts are instituted as well.

Significant integrity issues. As noted by numerous local and international reports, significant integrity issues persist in CED. The trade community reports little noticeable progress in the reduction or occurrence of the fees. CED must be recognized for several initiatives to improve its performance in this area. These include:

- Implementing an official code of conduct on January 1, 2007 that is very clear and strict as well as unique among the border agencies. Each officer must carry this document, which is a clear statement that corruption and inappropriate behavior is not condoned or tolerated. It contains a preface from the Director General, and all officers must sign a statement that they understand the Code of Ethics and will abide by it.
- Implementation of a two-year staff rotation policy to reduce the opportunity for collusion through familiarity.
- Discipline of officers proven to be involved in smuggling activities.

Still, CED lacks the organizational structure to properly investigate and pursue alleged infringements. It also lacks the power to terminate employees for gross malfeasance. Unless the MEF approves a termination, CED must use such actions as reassignment to discipline officers complicit in smuggling.

However, it is very difficult to approach this issue in isolation as an agency. The insidious problem of corruption is a two-way street, and part of the trading community also share blame as an active participant, in particular, the portion of the trade community members that represents rich and powerful interests involved in smuggling and other illegal operations. For the best CED officials, these actors are difficult to confront, particularly for the more junior officials. Integrity reform is a personal high-risk endeavor since those resistant to change are well-organized and well-connected.

Adoption of a comprehensive integrity program within CED should prove beneficial. The World Bank has set aside \$60,000 to assist in development of such a project, which CED should use to undertake this initiative and then make a significant commitment on a much larger scale.

Training and Staff Development

A dedicated training unit exists within the CED. It works in modern accommodations and includes a computer training room. This unit develops an annual training plan that serves as the basis for programs conducted throughout the year. New recruits undergo up to six months of formalized training before assignment to the field, where an on-the-job practical training program continues. However, the practical training is less structured than the classroom-based

training and should be improved. Also, training efforts are hampered by a shortage of modern training material in Khmer and English.

In order to develop a more modern workforce, proper resources must be applied. These resources include redesign of programs to address more modern trade facilitative processes. Also, a core of practical trainers needs to be established at the major ports and airports. Theoretical and practical training need to be effectively evaluated and monitored.

Operations

Cambodian import procedures are complex and burdensome. Too many forms and approvals are required. Unnecessary duplicate information is often requested. Processing times are often lengthy. This lack of a coherent and efficient business process causes confusion, unpredictable outcomes and added expense.

One example of the current state of affairs is the pre-shipment inspection program. The program, recently extended through 2008, aims to reduce opportunities for delay and corruption. Under this regime, a large range of imported goods valued over \$4,500 must be inspected at the point of departure from the exporting country to verify quantity, valuation, and general invoice data. The container is then sealed and certification of findings sent to the CED with the expectation of expedited entry. The costs to the importers are relatively minor. However, despite this program, CED still examines many shipments on arrival.

CED has made a number of adjustments that improve trade flows, which include the following:

- **Improved Procedures for Garments.** To their credit, the Cambodian authorities streamlined export procedures for garment and textile exporters. Compulsory container X-ray scanning of exports at Sihanoukville port, which caused unnecessary congestion and additional costs to the trader (\$80 per container), has been eliminated. However, export procedures in non-garment sectors remain overly complicated and burdensome.
- **Single Administrative Document.** CED has developed a Single Administrative Document (SAD) that all border agencies will use for processing transactions when the IT system is implemented in 2008. Although the SAD contains more data fields than the current ASEAN standard, it represents a major step toward harmonizing border procedures for Cambodia.

These operational reforms should be sustained and expanded to cover a broader range of customs procedures.

Automation

In April 2006, with World Bank funding, Cambodia signed an agreement for implementation of the web-based ASYCUDA World, a leading off-the-shelf media for Customs modernization. This United Nations Conference on Trade and Development (UNCTAD) system is currently used in more than 85 countries. The system can accommodate the majority of international trade

practices and, when used in conjunction with the streamlining of procedures and Direct Trader Input (DTI), can be very effective in increasing trade facilitation. The systemic use holds significant promise for improved trade facilitation.

Unfortunately, recurrent implementation delays have postponed the Sihanoukville pilot program to early 2008. Even with the 2008 date, the following concerns remain about whether CED will reap the full benefits:

- Lack of re-engineering of the existing complex, redundant processes prior to implementation.
- Little or no private sector involvement. (Although the original schedule noted June 2007 for pilot site start-up, the first Trade Consultative Committee (TCC) was not called until July 2008.)
- Reliance on service centers operated by CED for data input with limited DTI.
- Lack of required CED IT skills to maintain the system following implementation.
- Poor infrastructure, including unreliable electricity and telecommunications in many border locations.

These issues must be addressed if the intended benefits to improved facilitation and controls are to be realized. ASYCUDA gives CED the potential to eventually adopt international best practices in trade processes if used as more than a source for data collection.

Risk Management

Risk management (RM) is the foundation of modern customs operations. It provides a systematic approach to making decisions by identifying, assessing, understanding, planning and communicating risk issues. For Customs and other border agencies, it moves institutions from inefficient broad-based control system to a rational, data-driven process for handling goods. In this era, most countries have adopted an RM approach and re-focused their Customs and other control agency resources to goods that have the highest potential impact on revenue, the economy, and the health and welfare of its citizens. As a result, a large proportion of safe and compliant international shipments cross borders quickly with minimal formal requirements. In addition to faster movement, there is less opportunity for bribe solicitation and payment.

As noted, Cambodia instituted RM practices with Sub-Decree No. 21 “The Facilitation of Trade through Risk Management” in March 2006. This regulation did the following:

- Established the Inter-Agency Coordination Group to expedite the development and implementation of RM
- Designated CED as the lead agency
- Set targets of a 50 percent examination rates for 2006 and a 25 percent by the end of 2007.

However, stated examination rate targets have proved unrealistic given the current low institutional capacity. RM development progress has been slower than expected due to a combination of practical constraints and internal and external resistance. For example, one barrier is the lack of a competent and well-staffed intelligence unit to support the system. Another problem is the extensive “prohibited” list. The list itemizes banned and restricted goods, and it is a key document in determining risk levels and resulting inspections. The initial list contained about 4,000 items, representing nearly 50 percent of the entire tariff schedule. This list was pared to 1,500, a number still too high and reflective of agency reluctance. CED is leading the effort to create a reasonable list. Additionally, compliance levels in the trade community are low. Of the 1,700 companies conducting import-export transactions, most do not have sufficient tracking or accounting records to enable Customs to employ a post audit approach for verification of transactions.

Encouraging developments include Sihanoukville pilot and donor support. Through donor support (JICA and AusAid), preparatory work for a rudimentary RM approach has been completed, and JICA is undertaking the continued upgrading and integration/standardization by using a regional approach that includes Cambodia, Vietnam, and Thailand.

Enforcement

Major Customs enforcement issues include misclassification, undervaluation and, most significantly, smuggling. Smuggling continues to be an endemic problem within Cambodia and its neighbors. Effectiveness of CED’s enforcement efforts is hampered by inadequate tools, limited compliance culture, weak intelligence gathering, and powerful and well-connected individuals.

The government acknowledges that smuggling is a serious national problem and has lent strong support to CED in its enforcement programs. CED notes that it is aware of the negative impact these activities have on revenues and economic development, particularly for small and medium-sized enterprises (SMEs). In 2001, the government issued “Order no. 2” that created an inter-ministerial committee to attack the problem by developing close cooperation among all border agencies. CED was appointed to lead the effort, and inter-agency cooperation is said to have improved. Additionally, CED developed a clearly delineated anti-smuggling organization with 30-40 percent of staff focused on the issue. In 2003, an effective incentive program was initiated to set aside additional revenue collected from anti-smuggling activities to pay incentive rewards to CED officers. Also, an enforcement strategy is set to address high risk areas with the top priority of illegal petroleum products. These products account for over 20 percent of the total tax revenue.

Public-private partnership

Private stakeholder involvement in Customs reform planning and implementation expedites the overall process and allows for a smooth transition. Involvement also usually increases the level of voluntary compliance and can be revenue enhancing.

In Cambodia, there is a very limited culture of cooperation and partnership between the public and private sector. The Government-Private Sector Forum (G-PSF) has been beneficial in addressing some significant issues. CED's Trade Consultation Committee is still untested. A low level of trust exists between the parties, and a more modern era of frequent and meaningful exchanges has yet to be realized.

Increased responsiveness to legitimate trade concerns must be secured to achieve full partnership. This partnership requires a willingness to engage in thoughtful discussions and a more developed private sector that is represented by strong sector organizations. Although these generally do not exist in Cambodia there are exceptions, which act as models, such as the Garment Manufacture's Association of Cambodia (GMAC). The GMAC model should be replicated to improve the relationship across all sectors.

D. Supporting Institutions – Public

Although CED is the main implementing institution for the movement of goods, an efficient trading system relies on an interdependent process that includes other trade-related public sector institutions, including the border patrol, immigration, agriculture and other institutions. These institutions' capacity and performance can result in significant costs (or savings) within the trading system, and optimized trade facilitation depends on their active involvement. Like CED, these other trade-related public agencies need sound management, well-trained staff, modern equipment, modern facilitative procedures, and active dialogue with the trade community to respond quickly and predictably to issues while guarding the public safety and security of the country. Supporting institutions that are public include: CAMCONTROL, Cambodian Special Economic Board, and the public ports.

Ministry of Commerce: CAMCONTROL

The primary supporting institution is the Ministry of Commerce's Cambodia Import-Export Inspection and Fraud Repression Department (CAMCONTROL). CAMCONTROL is responsible for most sanitary and phytosanitary (SPS) controls and consumer and fraud protection. The agency has 485 employees organized into seven offices with 18 branches. Education within the staff is relatively high, with 66 percent holding bachelor degrees, 57 with Masters degrees, and three with PhDs CAMCONTROL offers training programs on international SPS requirements.

Streamlined processes. Over the past two years, border processes have been reformed through the mandate of single inspections. Most notably, Sub Decree 21 (2006), "The Facilitation of Trade through Risk Management," designated Customs as the lead agency. Prior to the sub-decree traders endured *double* inspections and were stopped by CED *and* CAMCONTROL. This action represented a key step in harmonization of inter-agency processes and is critical in preparing the country for the planned implementation of the upcoming ASEAN Single Window.

As it develops into a more modern agency, CAMCONTROL has its challenges. The agency needs modern equipment for analysis, especially in its laboratory which currently lacks accreditation. The agency requires a fully-staffed and professional intelligence unit to conduct

quality risk assessments. As a whole, the agency appears to be large in staff numbers, especially when compared to CED. (In most countries equivalent institutions have smaller staffs that assume more of a policy role with Customs implementing routine inspection functions.) Also, it is reported that CAMCONTROL collection of unofficial fees by officers is a continuing problem.

Cambodian Special Economic Zones Board

The Cambodian Special Economic Zones Board was established as a public body to oversee Special Economic Zones (SEZ) operations and approvals. The government sees these areas as an opportunity to attract investment in light manufacturing and agro-processing and has recently reinvigorated the zone regime.

SEZ development is not a comprehensive strategy to promote investment. However, for a country hobbled by years of war and underinvestment, SEZs provide a near-term starting point that focuses strategy and resources on upgrading targeted capacity and infrastructure deficiencies. For this reason, Cambodian SEZs have the near-term potential to accelerate and diversify foreign direct investment (FDI) in Cambodia, a conclusion echoed in the project's feasibility studies.

Cambodia's SEZ structure includes features common in most economic zones: 1) incentives, 2) standard duty- and tax-free status of inputs and outputs, 3) quality infrastructure, and 4) streamlined regulatory processes. The SEZs are strategically located close to import and export points, such the Vietnam border and major port, Sihanoukville. Although approval has been given to open almost 10 more sites, the Bavet zone is currently the only active operation.

Bavet SEZ. The Bavet SEZ was approved in mid-2005 and is located near the Cambodia-Vietnam border. Manhattan International Group, the only complete backward linkage operation in Cambodia, is the operator developing this site. A key to successful SEZ operation includes streamlined regulatory processes and public agency officers to facilitate these processes. The Bavet zone operator attempts to facilitate the public officers by providing living and housing assistance. However, cooperation levels needed to ensure the user of quality expedited service still remains a goal rather than a reality. For example, a "one-stop shop" concept has not been realized due to poor interagency coordination.

Sihanoukville SEZ. The Sihanoukville Port is developing an adjoining SEZ. Japan is undertaking a feasibility study to identify targeted foreign operations and sectors. With effective development and marketing, the SEZ could be useful in securing foreign investment and increasing port activity. The facility will supply its own infrastructure, including water, sewage treatment, and electricity and, thus, circumvent the unreliable and expensive utilities. Construction is expected to be completed within a two-year period and start in early 2008.

Public Ports

Cambodia's two principal ports, Sihanoukville and Phnom Penh, are operated and managed by State Port Authorities under the Department of Public Works and Transport. Each is independent

with its own Board of Directors composed of other public agency representation. The Sihanoukville Port handles about 70 percent of international cargo, and the Phnom Penh Port handles about 15 percent. The two port management teams express strong support for modernization and need significant additional resources to reach this goal. These entities are often the vehicles of change within their environment. Their personnel are paid relatively higher salaries, which appears to result in higher quality of staff and lower unofficial fees.

Sihanoukville Port. Sihanoukville cargo use feeder vessels that haul cargo to Singapore, Malaysia, and Hong Kong for reloading to final destination. The type of cargo handled is almost evenly divided between general cargo, oil, and containerized freight. Sihanoukville facilities are antiquated, with little modern equipment for efficient handling of cargo or automated capabilities. An \$80 million loan from Japan allows for the purchase of new equipment (e.g., seven gantry cranes and five terminal tractors) and an automated port operational system planned for 2008. UNCTAD is training executives of both public ports in modern port management, human resource development, and marketing.

The Phnom Penh Port is the international river port for the country's access to the South China Sea through Vietnam via the Mekong River. In 2002, the port converted to an all-container operation, and volumes are increasing. About 60 percent of the current volume of 2,500 TEUs per month is bound for or originates from China, with most containers imported full and exported empty. The normal transit time to and from Ho Chi Minh City, Vietnam, a distance of about 240 miles, is about one and a half days. Like Sihanoukville, the port lacks modern facilities for expeditious cargo processing.

E. Supporting Institutions - Private

Supporting private institutions include business associations, transporters (e.g., trucking, express carriers), freight forwarders, customs brokers, warehouse facilities and private ports. Cambodia's private sector trade-related institutions display a range of capacity levels. Reflective of its current basket of traded goods, which is dominated by garments, private institutions involved in garments indicate a higher degree of advancement.

Garment industry. Export operations must be in the formal sector to receive export authorization and secure duty-free status on the importation of raw materials. The few formal sector companies that exist are predominately multinational and engaged in the garment manufacturing, which represents 80 percent of all exports. (Ninety percent of businesses in Cambodia are SMEs, usually operating in the informal sector.) Of the approximately 286 registered garment exporters, about ten large producers account for more than half of the total production. Garment manufacturers serve as assembly plants for foreign companies headquartered in ten countries, mainly China, Hong Kong, South Korea and Taiwan.

This crucial Cambodian industry now must compete on a level playing field internationally. To do so, they must reduce costs through reduction of non-tariff barriers, such as bureaucratic processes and redundancies, and improve productivity (currently 35 to 40 percent lower than international norms).

Transport Costs: Overland, Port and Waterways

Cambodia has made a number of advances in lowering transport costs through various reforms such as:

- Simplifying import processes, which has reduce wait times -- delays at the port are down to one to two days from a high of 45 a few years ago
- More rapid document processing in certificates of origin in one to two days
- Expedited processes for key sectors: garments and SEZs.

However, overland, port, and waterway transport costs remain the most expensive in the region, double that of Thailand and substantially more than in Vietnam. Estimates range from \$200-400 per container. The reasons for this discrepancy include:

- Overstaffing at the ports
- Lack of modern equipment and facilities for efficient cargo handling
- Labor-intensive operations with manual oversight and controls that do not link to the carrier's systems create an error prone environment and delays
- Unofficial fees collected by border agencies estimated to amount to \$200-250 per container
- Excessive container scanning fees of \$50 to \$80 per container, assessed on almost all imported goods and some exports at Sihanoukville
- Fuel costs that are almost double that of Vietnam and Thailand
- High cost of spare parts for maintenance and repair of the truck fleet (Cambodia must import these parts, which are subject to high duty rates, while Vietnam and Thailand both produce the parts locally.)
- Centralization of import and export authorizations and decision-making reserved for a high level official, which delays problem resolution and holds up clearances
- High examination rates
- Long delays for formalities
- Arbitrary detentions by public agencies (particularly at the border area)
- Prohibition of navigation in Vietnamese territory between 6 pm and 6 am
- Collection of tolls by ports where no service is rendered.

The result is the vast underutilization of commerce, especially for waterway and seaborne transport, a comparative advantage for Cambodia because it is the cheapest way to move goods. These heavy opportunity costs are particularly detrimental to Cambodia. These burdens must be

eliminated and procedures streamlined and coordinated to strengthen the business sector and encourage growth.

Trucking

About 400 trucking companies operate in Cambodia, with the 20 largest controlling about 70 percent of the total fleet. These trucks ply some of the least developed road infrastructure in the region. However, the Phnom Penh-Sihanoukville route, the overland road for about 70 percent of all trade, is in good condition. Most of these companies perform other services such as warehousing and customs clearance for their clients. Estimates are that 50 to 70 percent of the fleet is in good condition. However, no national standards for quality control, inspections, or certification of roadworthiness are available to verify this number. The sector currently has exclusive rights to transport international cargo within Cambodia. If cargo travels overland to or from a neighboring country, only Cambodian trucks can haul it within the country, with the transfer taking place at or near the border.

Transferring cargo at the border to another truck adds to costs, especially during the rainy season, and contravenes Cambodia's regional obligations. Therefore traders have not realized the cost reductions that have resulted from opening these markets to regional players, as has been demonstrated in Laos.

The Cambodia Trucking Association was founded in 1994. It has 18 members, all of which must have a minimum of ten trucks to join. All but two of the large companies are members. The association serves as an advocate for the industry, but does not have a solid record of accomplishments due to poor cooperation with public agencies.

Private Ports

There are several private ports in Cambodia. Oknha Mong Port is the principal private sector port and the first private investment in port infrastructure in the country. The investor, Mong Rithy Group, is one of the largest nationally owned companies in Cambodia. Its growth has been limited due to its ability to accommodate only smaller vessels and barges. Operating hours at the ports accommodate trade volumes that are highest on weekends.

Express carriers

Cambodia's air express industry is a key factor in the competitiveness of the garment trade. The focus of this sector is no longer on transporting documents. It is focused high-value, time-sensitive goods. All major international players (e.g., FedEx, DHL, UPS) are present in the market. However, the authorities do not allow formation of industry associations.

No special rules for regulation of this sector's packages are in place. Cargo arrives and is cleared at the airport. Electronic manifest clearance is only used by one company, which provides the agency with the required software and internet access. Other companies pass hard copies of their electronic manifests to CED. Release occurs generally within 24 hours of arrival, with 50 to 60 percent of packages subject to inspection. There appears to be no predictable standardized

process for clearance of express consignments. The requirements are the same for these goods, as any commercial shipment. In reality, these goods are cleared without the filing of a formal Customs declaration. It is reported that a Customs officer reviews the package, and states a price to secure release, payment is made, and release is granted. It is perceived that importers do not opt for the formal process due to its high costs and the time required to comply.

Freight Forwarders

Cambodia has 80-100 freight forwarding companies, about 20 percent of which deal with international transactions. Most provide Customs clearance services as well. The sector is composed of local and international firms. Generally these companies perform quality service at competitive prices and maintain good relationships with the marine carriers. The garment producers usually do not select the freight forwarders to handle the shipping arrangements. Rather, the headquarter offices of these worldwide operations or the buyers, none of which are in Cambodia, negotiate long-term contracts with international forwarders to handle their shipments internationally to obtain cost savings. Although there is a fairly new Cambodia Freight Forwarders Association (CAMFFA), it has low membership (about 20 firms) and poor cooperation with public agencies.

Many international garment buyers establish international agreements with carriers and freight forwarders to handle all their shipments worldwide. These companies provide the full range of logistical services, including electronic tracking of shipment door to door. The selection of the freight forwarders or handlers to ship products to the US or Europe does not rest with the Cambodian garment manufacturers. As a result, this group generally exercises little if any control over the logistical charges that must be absorbed in the full on-board price of the goods agreed upon between the buyer and manufacturer. However, having a single trusted partner often offers security and low inventory and handling costs.

Customs brokers

Companies that are either engaged in freight forwarding or trucking conduct customs clearance activities. Currently about 100-120 companies and numerous individuals perform this function. The trade community estimates that approximately 30 percent of customs brokers are capable and professional. With the new Customs Law, CED now has regulatory oversight. A one-year phase-in program for licensing is now underway. This allows current brokers to apply for a temporary one-year license at a cost of \$5,000. Thus far, 195 applications representing 115 companies have been received. Following this application, candidates must meet educational and work experience requirements and pass a proficiency examination. These requirements should greatly enhance professionalism within the sector and lead to higher compliance rates.

Warehouse facilities

Cambodia has four dry ports, three private and one public, with the latter holding only a minor share of the market due to inefficient operations. The private operations are owned and operated by trucking companies. These operations offer comprehensive service, including devanning, stuffing and consolidation of containers, warehousing, CED and border agencies' clearance, and

door-to-door trucking service. Many importers in or near Phnom Penh prefer to take cargo inland from Sihanoukville to the dry port for clearance. All consolidated containers are released at these facilities. Garment producers use these facilities when exporting their products.

Turnaround time (including Customs clearance) at the private dry ports is four to six hours. The use of dry ports for consolidation and deconsolidation of containers is a regional best practice that could be used effectively. Dry ports are known to have significant delays due to lack of the presence of officers. Calls have to be made prior to arrival to ensure availability of an officer. The designated private Phnom Penh airport warehouse operator is considered to operate efficiently, with clearance provided within four hours of delivery of pre-arrival documentation.

The procedure whereby the manufacturer ships loose goods in cartons to the dry port designated by the buyer for stuffing in a container adds a minimum of \$1.20 per dozen pieces to the full on board value of the goods, a very high cost for consolidation services by industry standards. This cost, although outside the control of the producer, must be absorbed in the full on board cost of the goods. In addition, a particularly costly practice is the assessment of late penalties on all the manufactures represented in the container by the warehouse operator if one of the suppliers is late in getting the product to the warehouse.

Business Associations

Business associations serve as the voice of the private sector in policy formation and implementation. In a developing country like Cambodia, which has underdeveloped public institutions due to its short period of stability, the business sector should play a stronger role in monitoring public performance and participating in policy development. These groups should also be actively engaged in improving the capacity of their members.

GMAC. Currently there are few, strong dynamic private business organizations to fulfill this role aside from the Garment Manufacturers Association of Cambodia (GMAC). GMAC is known as a model business association generally, and it serves as an important lobbying group for trade facilitation. Its 286 members are very active. For example, they participate in trade negotiations involving international agreements and liaised with international organization to promote the garment sector. Membership is required, according to private sector representatives, in order to secure an export license.

National Transport Facilitation Committee. The National Transport Facilitation Committee, established two years ago in Cambodia under ASEAN requirements, has had little impact because the Transport Ministry is not a sufficiently powerful enough public agency to secure the required public participation. As a result of this weakness of this public-private partnership group, Cambodia has no national action plan or strategy to address the complex and serious transport issues facing the country.

Chambers of Commerce. Although about 12 provinces now have Chambers of Commerce, the only one of any strength is in Phnom Penh. It includes over 5,000 private businesses, or more than 30 percent of the formally registered enterprises. General membership is free, although forty elected members, largely business associations and large companies, pay \$100 monthly dues.

These dues constitute the operating budget of the Chamber. The Law on Chambers of Commerce also permits the chambers to borrow money for operating expenses.

The principal mission of the Chambers is to seek foreign investment in the private sector and donor support for training programs for its members in occupational trades, international industry standards for export, and general business skills. The Chambers of Commerce generally lack sufficient funds to perform their role in upgrading the business skills of the members. They depend on donor support for most training programs. The government, which has shown a higher interest in development of the business sector and SMEs, uses this private sector institution to promote growth.

The newly created provincial Chambers generally lack equipment, office space, telecommunications, and human resource capability. There is also a lack of trust in the intended purpose of the Chambers among some business owners, especially in the provinces. The Chamber of Commerce of Phnom Penh has secured donor funding for assessment of the current environment of the Chambers in Cambodia and to determine steps to be taken to strengthen this group.

F. Social Dynamics

Implementation of trade facilitation based on international standards, as required by Cambodia's WTO membership, is a long and complex process that requires serious and often painful institutional reforms that only evolve through strong local ownership and consensus building. If commitment to this reform process is weak, there is a real possibility that the result will be a changed process that does not deliver real reform.

Currently there is an atmosphere of high activity and energy within the trade facilitation arena that bodes well for future progress. There is top-level commitment to the effort, including the prime minister, and the program enjoys good donor support. Although the pace of reform is slow, progress is evident. However, entrenched resistance to modernization and integrity issues must be overcome to fast track the reform initiatives and improve the chances of success. Additionally, lack of capacity – particularly in mid-level public administration – must also be resolved.

A vibrant public-private sector dialogue, while nascent, is present. One example is formalized high-level dialogue between the government and the private sector, now embodied in the Government–Private Sector Forum, which is chaired by the prime minister. This venue has been a means of opening the dialogue between the trade community and the public ministries that regulate its behavior.

In regard to the media, newspapers and some radio stations are generally free of state control or censorship. These media outlets frequently highlight issues involving trade facilitation, especially infrastructure issues. With a 60 percent literacy rate and low circulation rates outside the capital, newspapers have a limited ability to influence change. Television channels tend to cover the ruling party's actions in only a positive light, with no critical investigation of problems

or coverage of the opposition, although television coverage also highlights challenges of trade facilitation.

G. Recommendations

- Continue and expand current Civil Service Reform efforts that address compensation and performance issues. These must include the following elements:
 - Pay a salary that is commensurate with a professional position of honor and trust, that will attract high quality personnel, and that will support a reasonable standard of living without the need for supplementary income. This is the intent of the government’s Merit Based Performance Initiative (MBPI).
 - Establish high standards for recruits and check backgrounds, finances, and references prior to employment.
 - Periodically check for law enforcement violations or criminal association.
 - Simplify the tariff and customs procedures and ensure transparency in all customs matters.
 - Establish internal controls and audit processes/systems to prevent breaches of integrity, and establish audit trails to identify and uncover violations.
 - Publish standards for cargo clearance and all customs services, and provide appeals for customs decisions.
 - Automate customs processes, building in internal audits and controls, and utilize systems for direct deposit of customs duties and fees to financial institutions.
 - Develop a code of conduct, a listing of core values, and a table of discipline that addresses integrity at all levels of the organization. This code of conduct should establish a “bright line” for integrity violations so that employees are able to clearly identify violations and wrongful acts.
 - Establish an internal organization to oversee and protect the integrity of the organization, its systems, and employees. The border agencies should be the first agencies in the Cambodian government to have the services of an internal affairs unit of investigators.
 - Create an environment in which importers and carriers feel safe bringing integrity issues to the attention of management. Toll-free hotlines and similar information gathering techniques should be instituted.
 - Make clear to the trade community that corruption on the part of customs or the trade will not be tolerated. Ensure that appropriate sanctions are in place for customs or business violators.
- Accelerate the re-engineering of the import-export process using maximum private sector involvement. If not undertaken, the current inefficient manual procedures that require continual contact between the trade community and CED officers will continue alongside IT processes.
- Strong customs broker regulations should be incorporated in the new draft Customs Law to improve professionalism of this sector. Provisions should include the ability to license applicants based on objective qualifications and to impose penalties and sanctions for

poor performance, including revocation of licenses and the periodic standardized review of company operations.

- Develop a partnership program with the brokers and customs to institute a joint training program using available resources and material within the region to upgrade the quality of the sector and keep brokers informed of the upcoming changes in process and procedures. Brokers themselves should also develop objective standards of performance.
- Implement special regulations to simplify and expedite lower value shipments of the express carriers shipments should be adopted so that the informal process now used can be eliminated without harming the trade. In addition, all low-value shipments, such as those under \$100 (a value used in some neighboring countries), should be allowed entry without formal declaration or duty/tax collection. This is an internationally-recognized customs practice.
- Strengthen private business associations, such as the Chambers of Commerce. Chambers in neighboring countries such as Thailand can be used as a model.
- Through the National Transport Facilitation Committee, develop a national transport strategy to address issues causing Cambodia to have some of the highest transportation costs in region. This committee must be strengthened and energized so that it can fulfill its role in this regard. This would be a collective effort between the trade community and national authorities to seek creative solutions to the problems and strengthen the competitive position of the ports and overland transport sectors.
- Establish achievable action steps and timetable for increase accountability and ownership within the public sector for implementation of the trade facilitation strategy. Clear, realistic public agency benchmarks and performance measurements with consequences for failure should be adopted by each border agency, with designated reform leaders given the authority to promulgate required changes. Monitoring responsibility should be clearly assigned and periodic progress reports issued. Local participation of both management and key employees within the affected agencies must be incorporated at initiation and implementation of all trade facilitation programs to increase national ownership.
- Increase inter-agency cooperation among the public sector institutions located within the SEZs. A lead office should be designated to work with the private sector operator to resolve conflicts. The operation of the SEZs in the Philippines could be used as an example of rendering of quality service.
- Increase capacity building within the border agencies through training programs targeted at the following areas:
 - Project management skills for the designated reform leaders
 - Intelligence gathering and analysis for CED and CAMCOM RM unit employees
 - Human resource management and development skills for CED personnel
 - Train-the-trainer programs for staff that will lead training efforts within their agencies.

- Training efforts focused on valuation and classification should be restructured to target selective officials to serve as a core body of experts.
- Create border agency one-stop shops at all major border locations and urban areas where the trade community is resident. Proper oversight and management must be in place to resolve issues that arise.
- Secure funding for needed equipment and technology to improve anti-smuggling efforts. Priority lists of such needs are in place. An impact analysis with details on the resource use should proceed any major initiatives.
- Cambodia and Vietnam should re-open negotiations on a new bilateral agreement for cross-border navigation on the Mekong River, using the analysis of the existing legal framework and the action plan developed under the auspices of the MRC as a guide. This agreement would remove all illegal non-tariff barriers such as border stops, make transit times predictable, and make the waterway a cost-effective means of international transport. Also, such resolution of the current problems most likely would result in donor support for modernization of the infrastructure at Phnom Penh port. Estimated savings of \$42 million per year in transport costs are possible.

XIII. Flow of Money

A. Introduction

Trade-related financial flows are essential to competitiveness. These flows are facilitated by strong banking sectors and are flexible where there is adequate access to credit and foreign exchange. Poor access to credit for domestic-owned traders impedes start-ups and stifles expansion by the country's producers. Burdensome foreign exchange requirements increase the costs of doing business and ward off foreign investors.

In Cambodia, cross-border transactions reflect a moderate amount of monetary exchange, as compared with neighboring countries. Over \$6 billion in goods and services were traded in 2005 – exports at \$2.7 billion and imports at \$3.7 billion.⁹² Net foreign direct investment (FDI) inflows amounted to \$216 million in 2005, which was up significantly from \$121 million in 2004. The banking system is of moderate size with 28 domestic and foreign banks, including 15 fully-licensed commercial banks, four specialized banks, at least nine micro finance institutions, and one foreign bank representative office.

Overall, Cambodian laws and public and private institutions support basic trade-related money flows, but the system is underdeveloped. While improvements have been made in basic credit and automated teller machine (ATM) services, and fundamental trade finance products are available to traders, trade finance products are not broadly used. Foreign currency exchange poses few problems as it is easily exchanged for all traders, and the economy is heavily dollarized.

B. Legal Framework

The basic legal framework regarding the efficiency and security of the most basic trade-related financial flows (i.e., letters of credit, currency exchange) is present and generally sufficient. Cambodia's Law on Banking and Financial Institutions was enacted in November 1999. Its government decree (Prakas) for implementation, enacted in early 2000, recognizes three categories of banking institutions:

- Commercial banks, which require a minimum registered capital of roughly 68 billion riels (\$13 million) and can carry out all banking activities.
- Specialized banks, which require a minimum registered capital of 10 billion riels (\$2.5 million) and can carry out a limited number of banking activities, as specified in the terms of their license.
- Microfinance institutions (MFIs), which require a minimum registered capital of 250 million riels (\$62,500).

The law defines microfinance as “the delivery of financial services such as loans and deposits, to the poor and low-income households, and to micro-enterprises.” All microfinance operators,

⁹² World Bank, “East Asia Update 2006.”

whether licensed or registered, are excluded from a range of financial sector activities, including leasing, derivatives, gold and commodities dealing, the provision of cheque facilities, and swap or forward dealing in foreign currencies. Registered and licensed operators must report to the National Bank of Cambodia (NBC). In addition, licensed MFIs established as limited liability companies must pay taxes.

Further development in the legal framework is required to allow for the trade finance products necessary to compete.

Legal issues that support trade facilitation. Prior to the Khmer Rouge, banks were well established in Cambodia. The system originally dates from the French colonial era. After the country achieved independence, a number of banks were closed. During the Khmer Rouge period, banks were physically destroyed and the currency was abolished. Thus, in the area of banking and trade-related finance, as in many areas, Cambodia had to rebuild from nothing.

Since reopening economically in the early 1990s, Cambodia has undertaken many necessary banking reforms. For example, Cambodian residents and foreigners can and do hold foreign exchange accounts. In fact, foreign exchange accounts represent 95 percent of deposits in Cambodia's commercial banks. Unlike neighboring Laos and Vietnam, foreign currency may be used in commerce, and currencies are easily converted. The legal structure allows for all the basic trade-related finance tools, including wire transfers, foreign checks, commercial letters of credit, standby letters of credit, documentary collections, and open accounts. Recently, Cambodian banks have been allowed to develop credit card and ATM operations.

Trade facilitation legal issues to address. Yet, to continue economic development, trade-related money flows need to be facilitated through a greater access to financial institutions and more trade finances products. These improvements will make Cambodia a more attractive place for foreign investment and trade. Most importantly, it will greatly benefit Cambodian producers, who are now hindered by legal and operational restraints regarding trade finance. Basic changes, noted elsewhere in this report, are necessary, including secured lending, negotiable instruments, and insolvency. Moreover, laws that provide more sophisticated financial tools, such as currency options and swaps, also should be adopted. Building the internal legal capacity in the various institutions is critical, including the NBC, the Bankers' Association, various ministries (Finance, Commerce, etc.), and the banks themselves.

C. Implementing Institutions

Banks. Cambodia's moderate-sized banking sector includes domestic and foreign banks in Phnom Penh. However, only a few banks have branches outside the capital. In fact, access to credit generally, much less trade finance and other financial services, is almost non-existent in rural areas, with the exception of a few micro-credit organizations. Although the **Association of Cambodian Local Economic Development Agencies (ALCLEDAs)** plans to remain present in the provinces, the Phnom Penh-based banking sector provides the key services that facilitate trade, including deposit, cash, international payment, loan remittance, ATM, corporate banking, treasury, leasing, basic letters of credit, wire transfers, and foreign exchange. Continuing the

development of the banking sector is critical to traders. Although much progress has been made, more needs to be done to extend use of basic and sophisticated product offerings.

Microfinance institutions. Donor institutions dominate microfinance in Cambodia. The industry is substantially credit-driven, with the exception of a few donor organizations that have developed savings products. In general, external donors or investors, not depositors, finance credit portfolios. Interest rates remain high due to high costs of operations, low cost efficiency, and relatively expensive borrowings from local and overseas sources. Key regulations for MFIs include:

- Capital guarantee deposit of five percent of capital
- Capital adequacy ratio of 20 percent
- Reserve requirement: minimum five percent of voluntary deposits
- Liquidity ratio: liquid assets of at least 25 percent of voluntary savings
- Aggregate loan commitment to any one client cannot exceed 10 percent of net worth
- Loan classification and provisioning regulation as “substandard,” “doubtful,” and “loss.”

The **Association of Cambodian Local Economic Development Agencies** is a non-profit national non-government organization (NGO) for micro and small enterprise development and credit. It resulted from the institutionalization process of an earlier International Labor Organization (ILO)/United Nations Development Program (UNDP) project targeting vulnerable populations. In October 2000, ACLEDA Bank Ltd. was licensed by the National Bank of Cambodia as a specialized bank, able to take public deposits and seek commercial funding to support the expansion of its core business. ACLEDA Bank was granted a full commercial banking license on December 1, 2003, and became ACLEDA Bank Plc.; this, allowed the organization to expand its range of services.

Under the transformation process, the original NGO transferred its assets and liabilities to the new ACLEDA bank, receiving 45 percent of the bank capital of \$4 million, while the ACLEDA Staff Association purchased a six-percent equity share. The remaining 49 percent was taken in equal part by the International Finance Corporation (IFC), Development and Environment Group (DEG), Financial Mechanism Office (FMO), and Triodos Bank. Thus, the former donors are now shareholders. In addition, the four foreign investors have all provided additional capital to maintain their shareholding position.

ACLEDA is now Cambodia’s leading provider of microcredit, holding almost half the national market, and is one of its largest commercial banks, with \$84 million in assets. ACLEDA is known as a tough lender – its lending policies are stringent and its enforcement of repayment is aggressive.

National Bank of Cambodia. Established in 1980, the NBC became autonomous in 1996 with a board of directors responsible for establishing operational policies and issuing decisions, regulations, circulars, and other directives. NBC supervises the banking system and is the banker for the state. The NBC is generally viewed as an adequate implementing institution.

D. Supporting Institutions

Association of Banks in Cambodia. The Association of Banks in Cambodia (ABC) was formed in 1994, and all banks are members. ABC's mission is to connect member banks to the public and government. While membership is mandatory, ABC is viewed as a constructive channel for improving the banking environment generally, including trade finance.

Cambodia Institute for Banking. In 2004, the IFC founded the Cambodia Institute for Banking (CIB). CIB is an institute that provides training for thousands of employees within Cambodia's financial services sector. CIB was organized by the ABC, IFC-Mekong Private Sector Development Facility (IFC-MPDF), the Asian Development Bank, and the ASEAN Bankers' Association. CIB provides international-standard training for ABC members. Training programs develop the capacity of loan officer to analyze loan applications and mitigate risk.

E. Social Dynamics

The following comment made in *Business Week* in 2001 remains true today:

Most Cambodians don't use banks, either because they are too poor or they don't trust them. "This country has lots of money under the mattress," says one banker. But as the economy revives, more budding entrepreneurs may realize that banks have their uses, too.

Nevertheless, the overall social dynamics of trade-related money flows are positive. New foreign banks have recently entered the market. The government; banks; large, medium and small exporters; and potential traders all call for better services, and many seem focused on the need for change. Capacity and knowledge is growing through programs like CIB. However, the capacity and the number of programs and events for a broader set of traders that promote better understanding of trade-related money flows seem insufficient. Media coverage of stories is viewed as adequate but needing improvement.

F. Recommendations

- Increase the sophistication and availability of trade finance products. While some trade finance products are available, many are not in wide use. Moreover, more sophisticated tools for trade financing are not available. There are numerous ways to develop these areas, including working with the ABC, CIB, chambers of commerce, and other business associations and working with development agencies to set up trade finance facilities, including the technical assistance to develop appropriate outreach (as the IFC has done with ACLEDA Bank). IFC has provided a \$5 million loan to ACLEDA to support the bank's expansion into small and medium-sized enterprise (SME) and on-lending to wholesale traders/financiers, integrators in the agribusiness sector, and licensed microfinance institutions.
- Increase institutional capacity to administer trade finance products. A major reason for the shallow use of trade finance appears to be the lack of institutional capacity to administer these mechanisms. More training can be provided to the relevant public and

private institutions involved in the CIB, such as the November 2005 course dedicated to trade finance. Additionally, pursuing a targeted public awareness campaign with importers and exporters would help educate the business community.

XIV. Flow of People

A. Introduction

For a small country recovering from recent civil conflict, people represent a significant and rapidly growing segment of cross-border flows. Total arrivals in 2005 reached 1,421,615, up 35 percent over 2004, when just over 1 million arrivals were registered.⁹³ The top five visitors came from Korea (216,584), Japan (137,849), the U.S. (109,419), France (68,947), and the U.K. (66,535). Tourism is now the second-largest foreign currency earner in Cambodia's economy. Angkor Wat and Cambodia's beaches have helped attract international tourism to the country.

Overall, within Cambodian laws and public and private institutions, significant improvements have been made to facilitate the flow of people. The government has greatly lessened travel restrictions, streamlined processes, and upgraded its automation. Additionally, the presence of Angkor Wat and the rise of the tourism industry have galvanized improvements in a broad group of related economic areas, including banking and infrastructure.

B. Legal Framework

The legal framework generally supports fundamental trade facilitation principles for people flows, and increasingly the regional movements of people as well. Under the Khmer Rouge, when the country was virtually closed, and up until the early 1990s, relatively restrictive policies and procedures were in place. Since then Cambodia's legal regime has supported growth in tourism.

Laws and regulations that support trade facilitation. Cambodia has a number of programs that facilitate tourism and business travel. For example, there is a limited visa exemption program whereby Philippine and Malaysian nationals are exempt from visas and may stay for 21 and 30 days, respectively. Additionally, for those who do need visas, Cambodia has facilitated travel by allowing visas to be acquired at border sites on arrival. While visas differentiate between tourists and business travelers, the procedures do not significantly favor one above the other. Tourist visas can be extended for one month, but only one time. Business visas can be renewed indefinitely. One of the more interesting legal and operational developments is the "e-visa." The Cambodian Ministry of Foreign Affairs recently made the "e-visa" available online through its website. By scanning passports and passport photos, a visa can be acquired within three days when it is issued by e-mail and printed from a computer.

Legal and Regulatory Issues to Address. Cambodia can further improve trade facilitation by providing easier, yet secure, access for a wider group of tourists and business travelers from additional countries beyond the currently eligible ones and by pursuing other regional opportunities. For example, neighboring Vietnam has signed agreements on visa exemption with 38 countries and is joining the APEC Business Travel Card (ABTC) program.

93 Ministry of Tourism, 2005 statistics.

C. Implementing Institutions

Overall, the major implementing institutions, the Ministry of Foreign Affairs and the Ministry of Interior, appear to have a clear mission and an active leadership that has made numerous changes in the past decade. As with many Cambodian institutions, there is major concern with integrity, especially at land border crossings.

Immigration operations that support trade facilitation. Cambodia's operational system for those seeking short-term and longer trade-related stays is considered improved. As noted in the legal section, visa on arrival has facilitated arrivals. This process is generally smooth, efficient, and transparent at the two major airports (Phnom Penh and Siem Reap), where 60 percent of arrivals are processed. Experience is also that consular services generally execute visas without great delay. International visitors who seek to extend their stay may do so with little difficulty. The immigration agency is seen as generally responsive to inquiries, and its fees are reasonable. Cambodian immigration officials use watch lists from INTERPOL, the United Nations, the U.S., and other sources to monitor entry and exit of dangerous persons. However, this procedure is not executed electronically in some sites. Cambodia's airport tax is nominal and transparently administered.

Immigration issues to address. Compared to other issues addressed in the diagnostic, Cambodia's Immigration Agency has few major issues to address. Among its major visitor modernization process issues, in addition to corruption at land borders, is automation.

D. Supporting Institutions

Ministry of Tourism. The Ministry of Tourism is a key supporting institution that has greatly furthered the facilitation of trade in Cambodia. The ministry is a relatively modernized institution that plays an important role in the country's development. In coordination with other ministries, the Ministry of Tourism has been at the forefront of change that has greatly increased this economic sector, including broad-based improvements to the trading system generally in areas such as infrastructure, banking, telecommunications, and other services.

Asian Development Bank. While there are numerous aid agencies and non-government organizations (NGOs) working in Cambodia, the Asian Development Bank plays supporting role through the Mekong Tourism Development Project (MTDP). The MTDP seeks to reduce poverty in the region, contribute to economic growth, increase employment, and promote the conservation of the natural and cultural heritage. The MTDP efforts include infrastructure upgrades and community and private sector participation to help rural communities.

E. Social Dynamics

The concept of improving trade-related people flows receives strong support in Cambodia. The government has made significant changes as it seeks to encourage visitors, trade, and foreign direct investment (FDI). People flows in the form of tourism are widely supported and encouraged at all levels – the executive branch, legislature, private institutions, and the general public.

F. Recommendations

- Continue to improve the visa system for easier access for trade-related visitors. Cambodia should consider more reforms and revisions to its visa system for tourism and business travelers to provide greater and easier access for those interested in visiting, trading, and investing in the country. Significant trading partners and countries that supply or may supply FDI should receive primary consideration. Regarding business travel, Cambodia should consider joining the Asia-Pacific Economic Cooperation (APEC) initiative to facilitate business travel (e.g., the APEC Business Travel Card (ABTC) program). Under the ABTC, card holders are exempted from visa and resident registration procedures and may use express immigration lanes in 16 other countries.⁹⁴ ABTC card holders are allowed 60-day stays for each visit.
- Upgrade the professionalism and modernization of the Immigration Agency. The government should assist the Immigration Agency in its implementation of integrity programs at the border, including strengthened independent internal affairs.

⁹⁴ The ABTC was initiated by Australia in 1996 and has been applied in three founding member countries - Australia, Korea, and the Philippines. So far, 17 APEC member economies have joined the ABTC programme, including Australia, Brunei, Chile, China, Hong Kong, Indonesia, Japan, the RoK, Malaysia, New Zealand, Papua New Guinea, Peru, the Philippines, Singapore, Taiwan, Thailand, and Vietnam.

XV. Financial Crimes⁹⁵

A. Introduction

Money laundering and terrorist financing have not been significant problems in Cambodia, in part because its financial system is relatively small and unsophisticated. Cambodia is beginning to take positive steps to put in place protections against a growth of financial crimes that may occur with growth in its banking sector and economy. The government has made strong statements of commitment to fighting financial crimes. If enacted, several draft laws will start Cambodia down a track toward compliance with international standards on financial crime preventions. These include a draft law on anti-money laundering and anti-terrorism financing, and a draft law to create a financial intelligence unit (FIU).

At the moment, however, Cambodia has few financial crime controls in place. There is currently no statute that specifically sanctions money laundering and terrorism financing. Nor are there rigorous controls on sources or destinations of funds. Smuggling of drugs, timber, and fuel is a problem, and much of the commercial activity in Cambodia is conducted in cash, which may be easily hand-carried across Cambodia's relatively porous borders with Thailand and Vietnam. Cash proceeds may also be converted into real estate or luxury sports utility vehicles without passing through the formal banking sector. Casinos also operate in a gray area of regulation with large sums of cash changing hands relatively unaccounted for. Thus, even with adequate controls over official financial institutions, Cambodia presents opportunities for laundering or other financial crimes.

The most significant problem Cambodia faces with respect to financial crimes is enforcement. The National Bank of Cambodia (NBC) has primary regulatory authority over the banking sector, but lacks capacity to investigate or monitor complex financial transactions. More importantly, the court system lacks capacity to investigate and prosecute complicated financial crimes, and has been wholly inadequate in enforcing serious crimes generally. A prominent pattern of corruption and impunity for businesspeople with political connections indicates that if significant financial crimes do occur that involve prominent government or military figures or their business associates, little will happen to prosecute those illegal transactions.

B. Legal Framework

Current Cambodian law does not specifically criminalize financial crimes apart from penal provisions on bribery and fraud. Neither money laundering nor terrorist financing are specific crimes under Cambodian law. The Law on Drug Control does criminalize money laundering, but only as it relates to proceeds derived from illegal narcotics activities. Cambodia has ratified the Convention for the Suppression of the Financing of Terrorism (September 2002) and the United Nations Convention against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988). Cambodia has not yet ratified the United Nations Convention against Transnational Organized Crime (December 2000) or the United Nations Convention against Corruption (December 2003).

⁹⁵ This chapter has not been updated since the passage of the Law on Anti-Money Laundering and Terrorism Financing in 2007.

Several important draft laws are nearing completion that would bring Cambodia much closer to treaty compliance and international standards. One is the Draft Penal Code, which is based on the French criminal code and would include a number of financial crime related offenses, such as money laundering and various types of banking fraud. The draft code has been in the works for years, however, and it is unclear when it will be passed.

Cambodia is also working on a Draft Law on Anti-Money Laundering and Terrorism Financing, which is the result of a joint effort by the NBC, the Ministry of Economy and Finance, the Ministry of Interior, and the Ministry of Justice. According to one review of the draft law, key elements include:

- Criminalizing money laundering and the financing of terrorism
- Enhancing customer due diligence
- Requiring stricter record keeping and internal controls
- Mandating more vigorous reporting of suspicious transactions
- Giving the NBC authority to apply anti-money laundering controls to casinos, lawyers, and accountants.

The drafting task force also identified several priorities of reform, including:

- Ratification of all relevant United Nations (UN) conventions
- Regulating and controlling non-government organizations (NGOs)
- Reducing the use of cash and encouraging the use of the formal banking system for financial transactions
- Enhancing the effectiveness of bank supervision
- Ensuring the use of national identification cards as official documents for customer identification
- Regulating casinos and the gambling industry
- Setting up an FIU both to serve as an information clearing house and to supervise compliance with all relevant laws and regulations.

The Cambodian FIU would be created by separate Law on Organization and Functioning of the Financial Intelligence Unit, which is also in draft stage, and awaits review by the Council of Ministers. A copy of the draft law was unavailable, but, according to one advisor who had reviewed an earlier copy, it would go a long way toward meeting international standards. The 2006 State Department report on money laundering states: “According to the draft law, the FIU will be placed under the control of the NBC with a permanent secretariat working under the authority of a board composed of the senior representatives from Ministries of Economy and Finance, Justice, and Interior.”

Cambodia is also drafting a Law on Anti-Corruption that would criminalize many corrupt activities in line with the UN Convention on Anti-Corruption, including a crime of unjust enrichment by public officials, and a crime of laundering the proceeds of corruption. This law is also being reviewed by the Council of Ministers after a 10-year gestation.

The Law on Banking gives the NBC authority to supervise and regulate all domestic and foreign banks. Under its authority, the NBC has issued a series of binding circulars in the past several years to impose stricter requirements on banks to identify account holders and report suspicious transactions. Among those requirements:

- The NBC requires all transactions over \$10,000 to be reported to the NBC.
- The NBC also directs banks to monitor accounts for individuals and entities identified in the UN Security Council Resolution 1267 Sanction Committee's consolidated list and to report any related activity.
- The Banking Law gives the NBC authority to freeze accounts that are related to suspicious activity, but not to seize assets. Instead, courts may seize assets upon conviction in accordance with the law on criminal procedure.
- Bank secrecy requirements do not bar courts of the NBC from obtaining information in the course of a duly authorized investigation.

C. Implementing Institutions

The National Bank of Cambodia. The NBC has primary responsibility for regulating the formal banking sector and is thus the principal organization in Cambodia for implementing financial crime prevention measures. It performs regular audits of member banks and receives information about suspicious transactions. The NBC issues circulars on customer and account verification requirements and anti-money laundering and anti-terrorism financing measures. The NBC also works with international donors to provide training to member banks regarding prevention of money laundering. Although its systems are improving, the NBC's current capacity falls short of international standards with regard to regulatory oversight for financial crimes.

When a suspicious financial activity has been identified by the NBC, the **Ministry of Interior** has authority to investigate. The Ministry of Interior is also responsible for regulating casinos, but, according to the State Department report, has exercised little control over their financial activities. There are a number of non-bank financial institutions in Cambodia – most notably casinos. The State Department's report identified 19 casinos, with most located on the Thai border and one large casino in Phnom Penh.

The Financial Intelligence Unit. Cambodia is awaiting passage of legislation that would create a formal FIU to coordinate and implement financial crime prevention measures. In anticipation of this legislation, the NBC has created a "pre-FIU" that is staffed with six bank regulatory employees and whose representatives have been attending international workshops and training provided by Japan, Australia, Germany, and Singapore to become familiar with FIU best practices. These employees will form the core of an FIU once it is established. However, at the moment no entity is performing the duties of an FIU. Even when the FIU is established, however, it will still be some time before all of the implementing institutions, from the NBC to the courts to the line Ministries that are responsible for different elements of compliance, have the skills to implement the complex requirements of the Financial Action Task Force (FATF) 40 Recommendations or other international standards.

The banks. Cambodia's banking sector is small and has relatively low volume, but it is growing slowly and steadily. Most banks are private and Cambodian-owned. There have been inroads made recently by international banks – most notably ANZ Royal, which has formed a joint venture with a local business conglomerate – and these banks are responsive to their own regulators abroad as well as the NBC for regulatory oversight. At the moment, these foreign regulations are generally more rigorous than those imposed by the NBC. However, this may change when the NBC implements the pending financial crime laws.

There is a **Cambodian Bankers Association** made up of most banks in Cambodia. The organization meets regularly and will lobby the NBC and the government on agreed issues of mutual interest or comment on draft laws. So far, the Cambodian Bankers Association itself has not taken a public position with respect to the anti-money laundering (AML)/anti-terrorism (AT) legislation that is being proposed, but individual member banks have provided input to the legislative drafting process.

The courts. The Cambodian court system is extremely weak and is ineffective at enforcing many major crimes. There have been very few prosecutions relating to financial crimes; most have pertained to illegal transport of cash through Cambodia's borders. Very few judges have experience in commercial matters, let alone more sophisticated financial crimes, which will make it difficult to implement the new laws once they are enacted. The courts are also plagued by corruption, and will almost never prosecute powerful actors with high government connections. In many cases, these are the very individuals who would have the access and ability required to commit larger financial crimes. Thus there should be significant concern that the existence of money laundering and terrorist financing regulations up to international standards may not ultimately lead to enforcement in the courts.

D. Supporting Institutions

Cambodia is a member of the **Asia/Pacific Group on Money Laundering (APG)**, a FATF regional body. The APG helps members implement anti-money laundering and terrorism financing efforts. Cambodia is seeking APG support to implement its FIU.

The foreign banks are one of the best supporting institutions in the area of financial crimes; they have correspondent relationships with Cambodian banks and thus impose more rigorous Western standards of accounting, auditing, and customer tracking. Several banks mentioned that they made changes to their systems following the enactment of the Patriot Act, and its long-arm controls of all banks connected to the U.S. or European banking systems. The practices of neighboring banks also determine the extent to which illicit proceeds from Laos may be freely laundered out of the country. Thus foreign financial regulations are an important vehicle for change with Laos. As more foreign banks like ANZ Royal enter the market, one can expect capacity and compliance across the banking industry to improve.

Donors have played a key supporting role in financial crimes reform. The Australian aid agency (AusAID) and Asian Development Bank have contributed technical expertise for the drafting of the anti-money laundering law. The United Nations Office on Drugs and Crime (UNODC) has also provided expert advice on treaty compliance and implementation. The

International Monetary Fund (IMF), International Finance Corporation (IFC), and World Bank provide support to the NBC to improve its monitoring accounting systems. Donors are also expected to provide critical funding and support for the FIU once it becomes operational. In particular, UNODC is planning a three-year regional capacity building project for banks and law enforcement in Vietnam, Laos, and Cambodia to increase detection, investigation, and prosecuting capacities of law enforcement and the judiciary (including Police, Prosecution, and Courts as well as FIU) regarding money laundering and terrorist financing.

E. Social Dynamics

Both the Cambodian government and the banking sector seem to be aware of the need to continue improving compliance measures that will aid in the prevention of money laundering and terrorist financing. Cambodia's banking sector underwent a major overhaul in 2001, which caused many sub-standard banks to close and greatly improved the health of the industry. It appears that a lesson was learned from that experience: sound regulation can improve economic conditions for lenders and businesses alike. Progress had been slow but steady, and increased anti-money laundering and terrorist financing mechanisms fit within the scope of that reform.

Another significant force for reform in the prevention of money laundering and terrorist financing is foreign banking regulations that apply to foreign-owned branches operating in Cambodia and to Cambodian banks with correspondent relationships with foreign banks. Several banks mentioned that their customer information systems were enhanced after the passage of the U.S. Patriot Act, and it was a general impression that regulatory frameworks from the leading economies had more of an impact on raising the bar of international standards than the regulations the NBC imposed. Foreign banks operating in Cambodia must comply directly with their national bank regulatory structure, which in the case of Singapore, Malaysia, and Australia means that these branches within the system are operating according to international standards. As foreign participation in the Cambodian banking sector increases, standards can be expected to rise.

On the other hand, there is clearly a significant illegal economy that operates in Cambodia, which includes smuggling of various goods, illegal logging, and other substantial forms of corruption. Much of this business is conducted in cash, and thus does not fall within the scope of anti-money laundering and anti-terrorist financing mechanisms that focus on the banking sector. Cambodia's lax customs and relatively porous borders mean that significant sums of illegal money may enter and leave the country relatively unchecked. According to the State Department's 2006 Cambodia country compliance survey, "some government officials and their private sector associates have a significant amount of control over the smuggling trade and thus its proceeds." In addition, a robust and largely unregulated casino industry offers a ready conduit for money laundering or other financial crimes. It is unclear to what extent this opportunity is exploited, but it is an urgent priority for reform.

F. Recommendations

- Quickly adopt the draft codes on money laundering, corruption, and terrorism financing that meet international standards.

- Ratify the UN Convention Against Transnational Organized Crime.
- Include regulation of casinos into AML and AT oversight regimes.
- Involve stakeholders in the banking and financial regulatory sectors in a participatory process to achieve practical implementation of AML laws and regulations.
- Provide resources and training of the FIU, including programs designed to reach out to related implementing institutions like banks and law enforcement.
- Encourage full participation in the Asia/Pacific Group on Money Laundering and facilitate participation in the group's mutual evaluation and training programs.
- Invest in increased computerization and automation of central banking functions.
- Increase public awareness of the social and economic costs of corruption and financial crimes.

XVI. Intellectual Property

A. Introduction

In a flurry of pre-WTO accession activity, Cambodia enacted three major laws pertaining to intellectual property rights (IPR)⁹⁶ that address trademarks, copyright, and patents/industrial design. Although the creation of this legal framework is important, greater public education and enforcement of IPR is warranted in the future. Counterfeit goods remain widely available in Phnom Penh and Siem Reap, and IPR are seldom enforced at the border.

For the purposes of this report, IPR refers generally to the legal protection afforded to industrial property and copyrights and related rights. Industrial property includes patents, trademarks, industrial designs, and geographic indications. Copyright includes literary works such as novels, poems, plays, reference works, newspapers, and computer programs; databases; films, musical compositions, and choreography; artistic works such as paintings, drawings, photographs, and sculpture; architecture; and advertisements, maps, and technical drawings.⁹⁷ Rights related to copyright further include those of performing artists in their performances, producers of phonograms in their recordings, and those of broadcasters in their radio and television programs.⁹⁸

B. Legal Framework

In 2002 and 2003, Cambodia enacted a series of laws pertaining to intellectual property as part of its push to join the WTO. Cambodia accessed significant donor support, particularly from European countries, to prepare these laws. The laws were drafted with significant consultation with the World Intellectual Property Organization (WIPO) and other international authorities.

Cambodia's IPR framework now consists primarily of:

- Law on Patents, Utility Model Certificates, and Industrial Design (January 2003)
- Law on Marks, Collective Marks, Trade Names, and Acts of Unfair Competition (February 2002)
- Law on Copyright and Related Rights (March 2003).

In addition, a Sub-Decree for implementing the trademark law was adopted on July 12, 2006. A Declaration instead of Sub-Decree for implementing the Patents, Industrial Design, and Utility Model law was promulgated on January 2, 2006.

To supplement the existing IPR framework, the government is reportedly working on draft laws pertaining to trade secrets, layout designs, geographical indications, and breeder rights and plant varieties.

⁹⁶ This Intellectual Property Rights (IPR) Section was completed following the in-country assessment that occurred in February 2006. The review provided in this section is based on information developed during the assessment, as well as on primary research materials as noted, and dates within this section reflect events following February 2006.

⁹⁷ See World Intellectual Property Organization, "About Intellectual Property," available at <http://www.wipo.int/about-ip/en/>.

⁹⁸ Id.

Cambodia joined the Paris Convention for the Protection of Industrial Property in 1998 and has belonged to WIPO since 1995. At this time, Cambodia does not belong to the Madrid Agreement on International Registration of Marks; the Berne Convention on Copyright Protection for Literary and Artistic Works); the Geneva Convention for Protection of Producers of Phonograms against Unauthorized Duplication of Phonograms; or the Protocol Relating to the Madrid Agreement.⁹⁹ According to the Ministry of Commerce, a Committee for Governing IPR of Cambodia is “currently working on the translation of the Berne and Geneva Phonogram Conventions” and “the benefits from joining the two Conventions are being carefully studied.”

Cambodia was admitted to the WTO in 2004. Like other Least Developed Country members, Cambodia is obliged to fully follow the Trade-Related Aspects of Intellectual Property Rights (TRIPs) agreement by July 2013 (a date the WTO extended from January 2007). The demands of TRIPs include compliance with a set of minimum standards pertaining to the underlying principles of IPR, protection of IPR, enforcement of IPR, settlement of disputes pertaining to IPR, and special transitional arrangements.

C. Implementing Institutions

Cambodia’s **Ministry of Commerce** is the primary body responsible for administration of the country’s IPR regime. Since 1997, there has been an Intellectual Property Department within the Ministry of Commerce that is charged with the registration of trademarks and related tasks.

Although the Ministry of Commerce posts a number of commercial laws on its website, the framework for intellectual property is incomplete. Only a draft copyright law seems to be among those posted as of November 2007.

Jurisdiction over specific areas of IPR, including enforcement, falls into other Ministries and offices:

- **Ministry of Industry, Mines and Energy** – registration of patents, industrial designs, utility models, new plant variety protection, and integrated circuit protection.
- **Ministry of Commerce**
 - **Intellectual Property Department** – registration of domestic and foreign trademarks; registration of patents, industrial designs, utility models, new plant variety protection and integrated circuit protection.
 - **Cambodia Import-Export Inspection and Fraud Repression Department (CAMCONTROL)** – border control.
- **Ministry of Culture and Fine Arts (Copyright Section)** – copyrights.
- **Ministry of Finance/ Customs and Excise Department** – border control.
- **Economic Police** – criminal enforcement of IPR.

99 See World Intellectual Property Organization international treaties page, available at <http://www.wipo.int/treaties/en/>.

Each of these agencies has received donor support through technical assistance and training.

Within the border agencies, namely **Customs** and **CAMCONTROL**, training in identifying counterfeit goods does not regularly occur – although that may be changing with the presence of new recruits – and border officials are generally unfamiliar with procedures to be followed when encountering counterfeit or pirated goods.

A significant implementing institution with respect to IPR in Cambodia is the **courts**, with **municipal courts** representing the first level of review. There are no separate economic or commercial courts that provide for concentration or specialization of judges in IPR. Judges who are expected to deal with IPR matters in the future will require significant and ongoing training in the understanding and enforcement of Cambodia's legal regime for IPR.

D. Supporting Institutions

The supporting environment for IPR in Cambodia is currently weak. Nonetheless, the country's strong network of NGOs and other independent institutions presents some opportunity for reform.

Cambodia's **law schools** are beginning to provide IPR instruction to its students, and government representatives with knowledge in the field have been invited to teach. In addition, study opportunities overseas are increasingly available to top students. Under the sponsorship of the World Bank, intellectual property officials have also participated in a television roundtable discussion with representatives from private sectors and the Research & Development Institute.

The **Lawyers Training Center** (LTC) is run by the Bar Council under the authority of the Ministry of Justice and provides training to successful applicants to the Bar Association. Participating in LTC training is a pre-requisite for being admitted to the bar. The year-long curriculum includes courses in general legal theory and limited coursework in intellectual property.

A handful of **private law firms** have been established in Cambodia for the purpose of helping clients protect and enforce IPR.¹⁰⁰ In addition, an IPR curriculum for private law firms has been prepared and will be conducted in early 2008. Intellectual property litigation offices have been established and resolve cases through administrative procedures.

The principal mission of Cambodia's **Chamber of Commerce** is to seek private sector foreign investment and donor support for training programs for its members in occupational trades, international industry standards for export, and general business skills. Although IPR is not at this time a central area of activity, the Phnom Penh-based Chamber may serve as a useful vehicle in the future for promoting private sector awareness of their obligations under Cambodia's IPR regime, especially if staged as part of an effort to assist businesses in accessing foreign investors.

100 See Intellectual Property firms in Cambodia, listed at http://www.hierogamos.org/hg/db_lawfirms.asp?action=search&subcategory=Intellectual%7CProperty&country=Cambodia.

The **EC-ASEAN Intellectual Property Rights Cooperation Program** (ECAP II) is an effort by the EU to strengthen TRIPS compliance throughout Asia, with a special emphasis on enforcement. ECAP II is active in Cambodia and provides country-specific and regional training, technical assistance, and study tour opportunities for government officials and others. Although ECAP II demonstrates strong expertise in the field, little of what it does in Cambodia comes from intrinsic national concern with the subject. Rather its programs are almost entirely donor-driven.

E. Social Dynamics

Cambodia is not among those countries that the Office of the US Trade Representative targets in its annual “Section 301” watch list report;¹⁰¹ however, the growing problem of intellectual property piracy in Cambodia is mentioned annually in US industry submissions.

F. Recommendations

- Track compliance of Cambodia’s adherence to its WTO accession commitments, including its commitments to IPR.
- In the area of IPR, the Ministry of Commerce should receive technical assistance and capacity building, with special attention given to coordination of assistance and leveraging of resources. Assistance to the other ministries charged with implementing IPR should include special programs pertaining to IPR.
- Encourage creation of a regulatory infrastructure for IPR.
- Target the community of supporting institutions – including business associations, law schools and other institutions of higher learning, NGOs, and the media – for the purpose of building basic public understanding of the principles of IPR.
- Work with ECAP II to target the most promising areas of IPR capacity-building, with an emphasis on identifying strong internal sources of motivation.
- To the extent they are not currently part of the curriculum, build IPR courses into judicial training programs.
- English language translations of Cambodian Laws on Patents and Copyrights, as entered into force in 2003, should be finalized and widely distributed to interested entities in print and electronic form.

101 Office of the United State Trade Representative, 2006 Special 301 Report, Watch List.

XVII. COMPILATION OF RECOMMENDATIONS

COMPANY LAW AND CORPORATE GOVERNANCE

No.	Type	Recommendation	Priority	Duration
1.	Institutional reform	<p>Continue, and if practicable expand, the implementation of company registration reform the Ministry of Commerce is carrying out with ADB assistance, including:</p> <ul style="list-style-type: none"> – Further simplify the forms – Expand the Ministry of Commerce website to host new procedures and policies, the text of the company law, all forms, all Ministry announcements and regulations; and statistics on companies such as those shown in the chart on page 19 of this Report – Establish provincial offices for registration of companies under Ministry of Commerce control; – Establish training programs for personnel. 	<p>High High</p> <p>Medium Medium</p>	<p>Short term Long term</p> <p>Medium term Medium term</p>
2.	Institutional strengthening/ Training	<p>Establish a program on corporate governance that would, among other things, provide training and education on corporate governance and protection of investors in Cambodia. As discussed earlier, the new company law contains several “advanced” provisions that follow international best practices. These can protect investors and encourage investment in Cambodia. There is still much to be learned from corporate governance guidelines and practices in other transition countries as well as countries with developed capital markets.</p> <p>This would, in effect, implement the corporate governance provisions of the new law just as the Ministry/ADB program is implementing the startup/registration provisions of the new law. Target groups would include:</p> <ol style="list-style-type: none"> 1. Judges, who have a strong need for knowledge in this area including knowledge of their powers under the derivative litigation and other parts of the new law 2. Company directors and officers 3. Company investors/shareholders 4. Potential domestic and foreign investors 	<p>High</p> <p>High High Medium</p>	<p>Short term</p>

No.	Type	Recommendation	Priority	Duration
		5. Financial institutions 6. Professionals, including lawyers and accountants.	High High	
3.	Institutional strengthening/Institutional capacity building/Technology	Establish procedures for greater collection and dissemination of data on companies, such as the data listed in “Information on Companies” above. Some of these data can be collected when a company registers (for example, identifying its business sector using a standard industrial code system).	Medium	Medium/ Long term
4.	Institutional reform	Consider establishing a “one-stop shop” system for regulatory approvals other than company registration, as many other countries have done. In this system, one single body coordinates (and may issue) all necessary approvals, following a uniform and consistent policy. The government’s general opposition to such a concept should be examined and sound alternatives should be explored.	High	Medium term
5.	Legal reform	Consider amending the new Company Law to require greater disclosure of company ownership and financial information (see “Lack of Disclosure by and Information about Companies” above) and to remedy the other investment-hindering governance provisions mentioned earlier.	Medium	Medium term

CONTRACT LAW AND ENFORCEMENT

No.	Type	Recommendation	Priority	Duration
1.	Education campaign	Once the civil code is passed, support a campaign of public education. Public awareness of contract law and contract issues is currently very low. Again, there is a great deal of potential for donor coordination on this point.	Medium	Medium term
2.	Institutional reform	Support clarification of the role of notaries and support the creation of a real, modern system of notaries. While creating a notary system in Cambodia will be a challenge, it should be noted that several developing countries have remarkably good notary systems. Also, a nationwide system of notaries may help spread good commercial practices across the entire country.	High	Medium term
3.	Institutional reform	Develop alternative dispute resolution (ADR).	High	Long term
4.	Training	Train judges in business law generally, and in contract law in particular. Although the Royal Academy of Judges is considered a strong institution, more must be done to assist judges in learning the new contract-related regime of laws.	High	Short term

REAL PROPERTY LAW

No.	Type	Recommendation	Priority	Duration
1.	Monitor	Monitor the implementation of the 2005 Sub-Decree on Economic Concessions and clarify the jurisdiction and rules for granting of economic concessions by ministries and bodies other than the Ministry of Land, Urban Planning and Construction. Expand the scope of the sub-decree to include all concessions issued for economic use by any ministry or other government body.	Medium	Long term
2.	Legal reform	Encourage investment in Cambodia by making the rules and procedures for land use by foreign persons simpler and more transparent and thus more secure. Consider the following: <ul style="list-style-type: none"> ▪ Allowing certain foreign persons (such as long-term residents and persons or companies making investments over a stated amount) to have land use rights the same as or similar to those of Lao citizens ▪ Issuing a formal regulation or law clarifying matters about foreign ownership of buildings and other attachments on land or companies or joint ventures that are partly foreign-owned and the holding of land by Cambodian citizens for the benefit of foreign persons. Eliminating or reducing investment license requirements for foreign holding of residential property. 	Medium	Long term
3.	Training	Establish training programs for State, Provincial, District, and Village officials on all of the above.	Medium	Medium term
4.	Legal reform	Continue and encourage expansion of the titling project.	High	Long term

SECURED TRANSACTIONS LAW

No.	Type	Recommendation	Priority	Duration
1.	Institutional reform	Support the new Filing Registry through public outreach, capacity building, and education of constituencies throughout the country.	High	Medium term
2.	Training	Provide judges with comprehensive training in the new secured transactions law, with respect to both concepts and procedures under the new law and the underlying principles of secured credit in a market economy. Judicial training should be a high priority.	High	Short term

No.	Type	Recommendation	Priority	Duration
3.	Finance education – private and public sectors	Encourage public education in secured transactions and other modern forms of financing, including seminars and conferences for bankers, lawyers, businesspeople, and accountants as much as for the general public.	Medium	Long term
4.	Assessment/ Analysis/Strategy development	Investigate cooperation with the ADB on other aspects of the multi-year blueprint for bolstering Cambodia’s financial sector. While most of the plan is not directly relevant to secured transactions, it is worth mentioning in this context. The plan appears to be well thought out, and some aspects of it (such as institutional strengthening at the National Bank) have already had a clear positive effect.	High	Short term

BANKRUPTCY LAW

No.	Type	Recommendation	Priority	Duration
1.	Legal reform	Support final enactment of the bankruptcy law. Previous commercial laws have tended to pass (or not) based as much on perceived donor support as on actual utility.	High	Medium term
2.	Consensus building	Given that the new bankruptcy law is almost ready, donors should aggressively and proactively coordinate their efforts. At the moment, only the ADB seems to be involved. Other donors can and should support implementation and institutional strengthening.	High	Long term
3.	Training	A bankruptcy law is useless without administrators. Administrator training should begin well in advance of the passage of the law, and efforts by the government to develop such training should be supported.	High	Short term
4.	Legal and regulatory	A framework for regulation of administrators should also be put into place. Cambodia has a history of state-granted monopolies or oligopolies of legal services, ¹⁰² so this should be a high priority.	High	Medium term
5.	Training	Judges should receive comprehensive training in bankruptcy law, with respect to both concepts and procedures under the new law and the underlying principles of formal insolvency in a market economy.	High	Short term

¹⁰² See, e.g., the discussion of notaries in this report’s chapter on Contract Law and Enforcement.

COMPETITION LAW AND POLICY

No.	Type	Recommendation	Priority	Duration
1.	Legal reform/ Legal drafting	Continue to prepare and complete draft competition law.	Medium	Medium term
2.	Legal reform/ Outreach	Further disseminate the draft law for comments. Utilize the existing Private Sector Forum to discuss the draft competition law. Request comments on the draft law from a variety of international experts.	Medium	Short term
3.	Legal drafting	Prepare an advocacy brochure for the National Assembly members, explaining in clear, basic language the principle purposes of a competition law in Cambodia, drawing on examples from existing studies (e.g., EU Multirap reports, CUTS studies)	Medium	Short term
4.	Legal reform	Provide technical assistance to make the law operational, including assistance in: (a) planning and setting priorities of the new agency; (b) assistance in drafting any required implementing regulations; (c) developing internal agency operating procedures for handling complaints, investigations, and exemptions; and (d) training agency staff in case screening and investigative techniques.	Medium	Medium/ Long term
5.	Legal education/ Training	Develop university classes and regional training programs.	Medium	Long term
6.	Assessment/ Analysis/Outreach	Continue advocacy initiatives, including reviews of policies and regulations affecting competition, and preparing studies on key sectors.	Medium	Long term
7.	Outreach	Promote a competition culture through public communication including: preparing communication/media materials; enhancing the capacity of media in publication of competition-related issues through dialogue/workshop with journalists; and engaging in dialogue/workshops with related law enforcement officers, other state regulators, and the business and academic communities.	High	Long term

COMMERCIAL DISPUTE RESOLUTION

No.	Type	Recommendation	Priority	Duration
1.	Institutional capacity building	Continue support for the Legal Training Center and Royal Academy of Judges and Prosecutors.	Medium	Long term
2.	Institutional capacity building/training	Provide financial support and training for an independent Commercial Arbitration Board.	High	Long term

No.	Type	Recommendation	Priority	Duration
3.	Institutional capacity building	Provide continued financial and political support for the Labor Arbitration Council.	High	Long term
4.	Legal reform	Promote a draft Commercial Court Law to provide for a limited number of independent, specialized courts to hear complex commercial cases with a streamlined appeals process.	High	Short/ Medium term
5.	Legal reform	Educate judges, court clerks, lawyers, and law students in the details of the new civil, civil procedure, and criminal procedure codes.	High	Long term
6.	Institutional reform/Legal reform	Apply diplomatic and financial incentives to encourage the government to achieve demonstrable progress in implementing the Legal and Judicial Reform Agenda, with priority areas including: -Strengthening of the Supreme Council of the Magistracy -Passage of primary judicial legislation – Law on the Organization and Functioning of the Judiciary and Law on Anti-Corruption.	High	Medium/ Long term

COURT ADMINISTRATION

No.	Type	Recommendation	Priority	Duration
1.	Consensus building/Outreach	Concentrate resources on establishing a coordinated, donor-funded legal database of laws, codes, and court decisions that is published and readily available to all stakeholders in the legal system.	High	Short/ Medium term
2.	Institutional capacity building/Monitor	Expand the NGO-administered Court Watch program to include monitoring and evaluation of civil/commercial as well as criminal disputes.	High	Long term
3.	Institutional capacity building	Enhance support and capacity of the school of court administration for improving training of court clerks and staff.	High	Long term
4.	Court facilities improvement	Upgrade court infrastructure, including refurbishing court buildings in the provinces and introducing computerized case management systems.	Medium	Long term
5.	Training	Concentrate on developing judicial training modules that increase capacity to understand more complex commercial disputes.	High	Long term
6.	Promotion/ Outreach/ Education	Promote passage of codes of conduct for judges, prosecutors, and clerks, and include court clerks and other staff in outreach and education programs relating to corruption.	High	Medium term

No.	Type	Recommendation	Priority	Duration
7.	Institutional capacity building	Continue to use the model court in Kandal province for important lessons that are transferable to other courts.	Medium	Short/ Medium term
8.	Institutional capacity building	Develop court recording systems on a pilot basis.	High	Medium term
9.	Institutional capacity building	Evaluate the relationship between court salaries and informal payments in the courts.	High	Medium term

FOREIGN DIRECT INVESTMENT

No.	Type	Recommendation	Priority	Duration
1.	Technology/ Monitor	Check all major internet postings of the Investment Law and make sure they are updated to include 2003 amendments.	Medium	Short term
2.	Legal drafting	Develop (or update previously developed) one or more free-of-charge, comprehensive sources of laws in English for outside investors to consider when they are looking at the possibility of investing in Cambodia. This is a critical source even before potential investors contact local firms to assist them in the investment process.	High	Long term
3.	Institutional strengthening	Provide support to the CDC in its investment promotion activities, including improvement of its website, development of stronger promotional materials, and bolstering of its ability to participate in investment fairs and other similar opportunities.	Medium	Long term
4.	Technology/ Monitor	For the benefit of foreign investors, the sub-group of laws, regulations, and court decisions that specifically pertain to commercial matters must be catalogued, translated, and placed online. This information must be continuously updated.	Medium	Long term
5.	Monitor	The wide variety of FDI-related donor initiatives should be continuously catalogued, monitored, and coordinated.	Medium	Long term

INTERNATIONAL TRADE LAW AND POLICY

No.	Type	Recommendation	Priority	Duration
1.	WTO compliance/Promote international standards/Monitor	A donor or an interested, objective member of civil society should track Cambodia's compliance with its WTO accession commitments, including both its technical commitments to trade facilitation and its representations pertaining to improved national legislation. The purpose of this effort is to be able to clearly demonstrate where government efforts are taking place, and where they are lagging.	High	Long term
2.	Institutional capacity building	The Ministry of Commerce should receive technical assistance and capacity building, with special attention to coordination of assistance and leveraging of resources.	High	Medium term
3.	Private sector improvements	SMEs should be considered a critical player in the development of trade law and policy. Business association support should continue, with increased emphasis on building SMEs into the international trade regime.	Medium	Long term
4.	Monitor/Assessment	The "Better Factories Cambodia" program should be continuously monitored for impact and lessons learned that may help support improved labor conditions through trade arrangements in the future.	High	Long term

FLOW OF GOODS AND SERVICES

No.	Type	Recommendation	Priority	Duration
1.	Customs modernization/ Promote international standardization/ Facilitate trade processes	<ul style="list-style-type: none"> Continue and expand current Civil Service Reform efforts that address compensation and performance issues. These must include the following elements: <ul style="list-style-type: none"> Pay a salary that is commensurate with a professional position of honor and trust, that will attract high quality personnel, and that will support a reasonable standard of living without the need for supplementary income. This is the intent of the government's Merit Based Performance Initiative (MBPI). Establish high standards for recruits and check backgrounds, finances, and references prior to employment. Periodically check for law enforcement violations or criminal association. 	High	Long term

No.	Type	Recommendation	Priority	Duration
		<ul style="list-style-type: none"> – Simplify the tariff and customs procedures and ensure transparency in all customs matters. – Establish internal controls and audit processes/systems to prevent breaches of integrity, and establish audit trails to identify and uncover violations. – Publish standards for cargo clearance and all customs services, and provide appeals for customs decisions. – Automate customs processes, building in internal audits and controls, and utilize systems for direct deposit of customs duties and fees to financial institutions. – Develop a code of conduct, a listing of core values, and a table of discipline that addresses integrity at all levels of the organization. This code of conduct should establish a “bright line” for integrity violations so that employees are able to clearly identify violations and wrongful acts. – Establish an internal organization to oversee and protect the integrity of the organization, its systems, and employees. The border agencies should be the first agencies in the Cambodian government to have the services of an internal affairs unit of investigators. – Create an environment in which importers and carriers feel safe bringing integrity issues to the attention of management. Toll-free hotlines and similar information gathering techniques should be instituted. – Make clear to the trade community that corruption on the part of customs or the trade will not be tolerated. Ensure that appropriate sanctions are in place for customs or business violators. 		
2.	Customs modernization/ Facilitate trade processes	Accelerate the re-engineering of the import-export process using maximum private sector involvement. If not undertaken, the current inefficient manual procedures that require continual contact between the trade community and CED officers will continue alongside IT processes.	High	Medium term
3.	Customs Modernization	Strong customs broker regulations should be incorporated in the new draft Customs Law to improve professionalism of this sector. Provisions should include the ability to	Medium	Medium term

No.	Type	Recommendation	Priority	Duration
		license applicants based on objective qualifications and to impose penalties and sanctions for poor performance, including revocation of licenses and the periodic standardized review of company operations.		
4.	Customs modernization/ Facilitate trade processes/Training	Develop a partnership program with the brokers and customs to institute a joint training program using available resources and material within the region to upgrade the quality of the sector and keep brokers informed of the upcoming changes in process and procedures. Brokers themselves should also develop objective standards of performance.	Medium	Medium term
5.	Customs modernization/ Facilitate trade processes/Promote international standardization	Implement special regulations to simplify and expedite lower value shipments of the express carriers shipments should be adopted so that the informal process now used can be eliminated without harming the trade. In addition, all low-value shipments, such as those under \$100 (a value used in some neighboring countries), should be allowed entry without formal declaration or duty/tax collection. This is an internationally-recognized customs practice	High	Medium/ Long term
6.	Institutional strengthening	Strengthen private business associations, such as the Chambers of Commerce. Chambers in neighboring countries such as Thailand can be used as a model.	High	Long term
7.	Strategy development	Through the National Transport Facilitation Committee, develop a national transport strategy to address issues causing Cambodia to have some of the highest transportation costs in region. This committee must be strengthened and energized so that it can fulfill its role in this regard. This would be a collective effort between the trade community and national authorities to seek creative solutions to the problems and strengthen the competitive position of the ports and overland transport sectors.	High	Short term
8.	Consensus building/Facilitate trade processes	Establish achievable action steps and timetable for increase accountability and ownership within the public sector for implementation of the trade facilitation strategy. Clear, realistic public agency benchmarks and performance measurements with consequences for failure should be adopted by each border agency, with designated reform leaders given the authority to promulgate required changes. Monitoring responsibility should be clearly assigned and periodic progress reports issued. Local participation of both management and key employees within the affected agencies must be incorporated at initiation and implementation of all trade facilitation programs to increase national ownership.	High	Medium term
9.	Consensus and ownership building/Monitor	Increase inter-agency cooperation among the public sector institutions located within the SEZs. A lead office should be designated to work with the private sector operator to resolve conflicts. The operation of the SEZs in the Philippines could be used as an example of rendering of quality service.	Medium	Medium term

No.	Type	Recommendation	Priority	Duration
10.	Customs modernization/ Technology/ Promote international standardization	Increase capacity building within the border agencies through training programs targeted at the following areas: -Project management skills for the designated reform leaders -Intelligence gathering and analysis for CED and CAMCOM RM unit employees -Human resource management and development skills for CED personnel -Train-the-trainer programs for staff that will lead training efforts within their agencies.	High	Long term
11.	Development of Integrated border functions	Training efforts focused on valuation and classification should be restructured to target selective officials to serve as a core body of experts.	Medium	Medium term
12.	Process redesign	Create border agency one-stop shops at all major border locations and urban areas where the trade community is resident. Proper oversight and management must be in place to resolve issues that arise.	High	Medium term
13.	Operations	Secure funding for needed equipment and technology to improve anti-smuggling efforts. Priority lists of such needs are in place. An impact analysis with details on the resource use should proceed any major initiatives.	Medium	Medium term
14.	Regional partnership and harmonization	Cambodia and Vietnam should re-open negotiations on a new bilateral agreement for cross-border navigation on the Mekong River, using the analysis of the existing legal framework and the action plan developed under the auspices of the MRC as a guide. This agreement would remove all illegal non-tariff barriers such as border stops, make transit times predictable, and make the waterway a cost-effective means of international transport. Also, such resolution of the current problems most likely would result in donor support for modernization of the infrastructure at Phnom Penh port. Estimated savings of \$42 million per year in transport costs are possible.	Medium	Medium term

FLOW OF MONEY

No.	Type	Recommendation	Priority	Duration
1.	Financial sector reform	Increase the sophistication and availability of trade finance products. While some trade finance products are available, many are not in wide use. Moreover, more sophisticated tools for trade financing are not available. There are numerous ways to develop these areas, including working with the ABC, CIB, chambers of commerce, and other business associations and working with development agencies to set up trade finance facilities, including the technical assistance to develop appropriate outreach (as the IFC has done with ACLEDA Bank). IFC has provided a \$5 million loan to ACLEDA to support the bank's expansion into SME and on-lending to wholesale traders/financiers, integrators in the agribusiness sector, and licensed microfinance institutions.	High	Long term
2.	Institutional capacity building/Training/Education campaign	Increase institutional capacity to administer trade finance products. A major reason for the shallow use of trade finance appears to be the lack of institutional capacity to administer these mechanisms. More training can be provided to the relevant public and private institutions involved in the CIB, such as the November 2005 course dedicated to trade finance. Additionally, pursuing a targeted public awareness campaign with importers and exporters would help educate the business community.	High	Long term

FLOW OF PEOPLE

No.	Type	Recommendation	Priority	Duration
1.	Legal and regulatory	Continue to improve the visa system for easier access for trade-related visitors. Cambodia should consider more reforms and revisions to its visa system for tourism and business travelers to provide greater and easier access for those interested in visiting, trading, and investing in the country. Significant trading partners and countries that supply or may supply FDI should receive primary consideration. Regarding business travel, Cambodia should consider joining the APEC initiative to facilitate business travel (i.e., the APEC Business Travel Card (ABTC) program). Under the ABTC, card holders are exempted from visa and resident registration procedures and may use express immigration lanes in 16 other countries. ¹⁰³ ABTC card holders are allowed 60 day stays for each visit.	High	Medium term

¹⁰³ The ABTC was initiated by Australia in 1996 and has been applied in three founding member countries - Australia, Korea, and the Philippines. So far, 17 APEC member economies have joined the ABTC programme, including Australia, Brunei, Chile, China, Hong Kong, Indonesia, Japan, the RoK, Malaysia, New Zealand, Papua New Guinea, Peru, the Philippines, Singapore, Taiwan, Thailand, and Vietnam.

No.	Type	Recommendation	Priority	Duration
2.	Institutional strengthening/modernization	Upgrade the professionalism and modernization of the Immigration Agency. The government should assist the Immigration Agency in its implementation of integrity programs at the border, including strengthened independent internal affairs.	Medium	Short term

FINANCIAL CRIMES

No.	Type	Recommendation	Priority	Duration
1.	Legal reform	Quickly adopt the draft codes on money laundering, corruption, and terrorism financing that meet international standards.	High	Short/ Medium term
2.	Legal reform	Ratify the UN Convention Against Transnational Organized Crime.	High	Medium/ Long term
3.	Legal reform	Include regulation of casinos into AML and AT oversight regimes.	Medium	Medium/ Long term
4.	Consensus building	Involve stakeholders in the banking and financial regulatory sectors in a participatory process to achieve practical implementation of AML laws and regulations.	Medium	Medium term
5.	Institutional capacity building/Training/Outreach	Provide resources and training of the FIU, including programs designed to reach out to related implementing institutions like banks and law enforcement.	High	Short term
6.	Outreach/Education	Encourage full participation in the Asia/Pacific Group on Money Laundering and facilitate participation in the group's mutual evaluation and training programs.	Medium	Medium term
7.	Technology/ Institutional capacity building	Invest in increased computerization and automation of central banking functions.	High	Long term
8.	Outreach/Education	Increase public awareness of the social and economic costs of corruption and financial crimes.	High	Short term

INTELLECTUAL PROPERTY

No.	Type	Recommendation	Priority	Duration
1.	WTO compliance/Monitor /Promote international standardization	Track compliance of Cambodia's adherence to its WTO accession commitments, including its commitments to IPR.	High	Long term
2.	Institutional capacity building	In the area of IPR, the Ministry of Commerce should receive technical assistance and capacity building, with special attention given to coordination of assistance and leveraging of resources. Assistance to the other ministries charged with implementing IPR should include special programs pertaining to IPR.	High	Medium term
3.	Institutional reform/Regulatory	Encourage creation of a regulatory infrastructure for IPR.	High	Long term
4.	Outreach/Education	Target the community of supporting institutions – including business associations, law schools and other institutions of higher learning, NGOs, and the media – for the purpose of building basic public understanding of the principles of IPR.	Medium	Short term
5.	Institutional capacity building	Work with ECAP II to target the most promising areas of IPR capacity-building, with an emphasis on identifying strong internal sources of motivation.	Medium	Medium term
6.	Training	To the extent they are not currently part of the curriculum, build IPR courses into judicial training programs.	High	Medium/ Long term
7.	Outreach/Education	English language translations of Cambodian Laws on Patents and Copyrights, as entered into force in 2003, should be finalized and widely distributed to interested entities in print and electronic form.	High	Medium term

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